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IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-1842

RUTH A. HAGAN, MARILYN B. DOW,
MARY LOU PATTISON

AND

JOHN CURTIS, M.D.,
Petitioners

v.

GEORGIA MAE DOWNS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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The Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on March 30, 1978.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is not yet officially reported. That opinion is reprinted in the Appendix to Petition, pages 13-41.

The bench ruling of the United States District Court for the District of Maine granting Petitioners' motions for a directed verdict is reprinted in the Appendix to Petition, pages 3-12.

JURISDICTION

The judgment of the court of appeals was entered on March 30, 1978. (Cert. App. 42) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the social worker Petitioners are entitled to assert qualified immunity from money damages under 42 U.S.C. § 1983 for actions taken in fulfillment of their official responsibilities.

2. Whether the unsettled state of the law defining a guardian's authority relative to the personal rights of his ward entitles the social worker Petitioners and Petitioner Curtis, if he is deemed to be a state actor, to qualified immunity as a matter of law.

3. Whether Petitioner Curtis, whose only challenged actions were taken while acting as the Respondent's private physician, can be characterized as a state actor by virtue of the position he held as Chief of Staff of the Milo Community Hospital which was characterized as a state actor by the court below.

STATUTES INVOLVED

The resolution of this case will not necessarily require the Court to construe the provisions of any particular constitutional provision or statute. Statutes which are referred to in the text of this Petition include Me. Rev. Stat. Ann. tit. 22, § 3794 (Supp. 1975), *as amended,* Me. Rev. Stat. Ann. tit. 22, § 3794 (Supp. 1977); Me. Rev. Stat. Ann. tit. 18, §§ 3505, 3605; and 42 U.S.C. § 1983, all of which are reprinted in the Appendix to Petition, pages 43-44.

STATEMENT OF THE CASE

Respondent commenced this action in the United States District Court for the District of Maine under 42 U.S.C. § 1983 in March 1975.[1] Jurisdiction in the district court was predicated on 28 U.S.C. § 1343. The gravamen of her complaint was that the Petitioners in conspiracy or acting in concert with the other defendants deprived her of certain constitutional rights by preventing her from marrying the person of her choice at the time of her choice, removing her child from her custody, and arranging for and performing a medical operation of sterilization upon her, all without her consent. The Petitioners, Hagan, Dow and Pattison, hereinafter referred to as the "social workers", were, at all times relevant, employees of the State of Maine Department of Health and Welfare. Petitioner Hagan was employed as a substitute care manager having supervisory authority over Petitioner Pattison, a social worker. Petitioner Dow was employed as a child and family service worker. Petitioner Curtis was, at all times relevant, Respondent's private physician with a private practice in Milo, Maine and was also the Chief of Staff of defendant Milo Community Hospital. The other named defendants were Davis Goodine, the Respondent's father; Roberta Sawtelle, the Respondent's sister and guardian; Carl Carlson, the town manager of the Town of Milo, who authorized payment for the sterilization operation out of town welfare funds; the Milo Community Hospital, where the sterilization operation was performed; and, Ava Strout, the administrator of the Milo Community Hospital.

Respondent is a deaf woman with borderline or dull normal intelligence who had received social services as a client of the Maine Department of Health and Welfare during the

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[1] Respondent also asserted a claim under 42 U.S.C. § 1985(3) upon which all defendants were granted summary judgment which was affirmed by the court of appeals.

course of her first pregnancy in 1971. Many of those services, including assistance with prenatal care and planning for her expected child, were provided by Petitioner Dow who had an opportunity to meet with Respondent on numerous occasions and communicate with her via written notes or through Roberta Sawtelle who was able to communicate with Respondent in sign language. Without the involvement of Petitioner Dow or the Department of Health and Welfare Respondent's child, shortly after his birth, was placed in the home of Davis Goodine where he continues to reside.

GUARDIANSHIP AND STERILIZATION

Subsequently, efforts were made by Petitioner Curtis, with some assistance from Petitioner Dow, Roberta Sawtelle and a state public health nurse, to assist Respondent with birth control methods including the use of birth control pills and later an I.U.D., both of which proved to be unsatisfactory. When Respondent became pregnant again in 1972, Davis Goodine contacted the Department of Health and Welfare and requested assistance with medical expenses, a sterilization and possible adoption of the expected child because Respondent had told him that she did not want any more children. Shortly after his request was made, Petitioner Dow met with him to discuss his request. Dow recommended that guardianship might provide a possibility for him to gain some control over his daughter, the Respondent; but she advised him that she did not know whether as guardian he could consent to a sterilization of the Respondent and advised him to consult an attorney. Subsequently, Davis Goodine filed a petition for guardianship of the Respondent in the Maine Probate Court. Shortly after Davis Goodine filed his petition seeking guardianship of the Respondent she voluntarily moved into the home of Roberta Sawtelle where she was housed, fed and generally

looked after while all the events relevant to this action took place and where she continued to reside until her marriage to Carroll Downs.

The probate court requested Petitioner Dow to prepare a report regarding guardianship of the Respondent. In preparing the report Dow discussed guardianship with the Respondent through Roberta Sawtelle acting as interpreter and reviewed materials regarding the Respondent which were in the files of the Department of Health and Welfare. Dow filed with the probate court her report recommending that Roberta Sawtelle be appointed guardian. After a hearing at which Petitioner Dow, Davis Goodine's attorney, Roberta Sawtelle, Respondent and an attorney representing Respondent and Roberta Sawtelle were present, the probate court appointed Roberta Sawtelle guardian of the Respondent. Respondent has not challenged the validity of that probate court order.

During the Respondent's second pregnancy Dr. Curtis met with her and Roberta Sawtelle and discussed sterilization. Dr. Curtis testified that he was convinced that the Respondent understood the operation and was in agreement with having it performed, although she testified at trial that she did not consent. At no time did any of the social workers request that Dr. Curtis perform the sterilization or request that Roberta Sawtelle, as guardian, execute a consent to the sterilization. Instead they followed their usual procedure in a case like this and suggested that the family discuss the matter with Respondent's physician, Dr. Curtis. There is no evidence to indicate that the social workers were aware or advised by either Dr. Curtis or Roberta Sawtelle that the Respondent had indicated any opposition to the sterilization. Prior to the sterilization Dr. Curtis contacted Petitioner Dow in order to determine what steps he might have to take in order to accomplish the steriliza-

tion within the law. Petitioner Dow advised him that that information would best be learned from the probate court judge and she advised Dr. Curtis to contact him.

Shortly after the Respondent gave birth to her second child the sterilization operation was performed on the strength of a written consent signed by Roberta Sawtelle as guardian and on what Dr. Curtis perceived and believed to be the Respondent's consent.

CUSTODY OF RESPONDENT'S CHILD

Prior to the birth of the Respondent's second child, Petitioners Dow and Pattison had discussions with Roberta Sawtelle regarding the unborn child and were advised that the Respondent did not want the child. Since there appeared to be a possibility that the child would be placed for adoption, the question arose as to whether or not the guardian was the appropriate person to consent to a surrender and release for the purpose of permanently terminating the Respondent's rights to the child, thereby freeing it for adoption. The Maine Attorney General advised the social workers that the guardian could not consent to such a surrender and release and recommended that a judicial commitment procedure be utilized in order to free the expected child for adoption. Nine days after the birth of the Respondent's child Petitioner Pattison filed a petition for its judicial commitment. Prior to the filing of that petition the child was placed in a foster home on the strength of an agreement executed by Roberta Sawtelle as guardian of the Respondent in accordance with Me. Rev. Stat. Ann. tit. 22, § 3794 (Supp. 1975), *as amended*, Me. Rev. Stat. Ann. tit. 22, § 3794 (Supp. 1977). (Cert. App. 44) Pending hearing on the commitment petition the Respondent did not express any concern or objection that her child had been temporarily placed in a foster home. At the commitment hearing

before the Maine District Court, she indicated that she had no objection to the child being placed in state custody. (Cert. App. 1)

RESPONDENT'S MARRIAGE PLANS

During the second pregnancy Petitioners Dow and Pattison became aware that the Respondent had some interest in getting married. Neither Dow nor Pattison wished to see the Respondent marry at that time because they believed that the intended husband, Carroll Downs, might have become the legal, although it is admitted that he is not the natural, father of the child. They believed that this might have unnecessarily delayed the judicial commitment proceeding which at that time was proceeding on the basis that the child was illegitimate. Their concerns were based in part on a statement made by Mr. Downs prior to the child's birth clearly indicating that he did not wish to have custody of the child. Although admitting that he made the statement, he testified that it was made in jest.

Petitioners Dow and Pattison expressed their views regarding the marriage to Roberta Sawtelle; however, neither the Respondent nor her intended husband, Carroll Downs, testified that Roberta Sawtelle refused to consent to the marriage but rather that she had asked them to postpone their marriage until after the child was born. The Respondent and Mr. Downs agreed to wait because they felt that they should obey the Respondent's sister, Roberta Sawtelle. Shortly after the birth of the child, the Respondent and Carroll Downs were married.

PROCEEDINGS BELOW

Prior to trial the Petitioners as well as the other defendants moved for summary judgment which the district court granted to defendants Carlson, Strout and Milo Com-

munity Hospital. During a jury trial before the district court and at the close of Plaintiff's case the court granted motions for directed verdicts on behalf of the Petitioners and the remaining defendants. (Cert. App. 3) On March 29, 1977 the district court entered judgment for the Petitioners and defendants Sawtelle and Goodine which was amended on April 26, 1977 to include all of the named defendants.

On April 28, 1977 the Respondent filed a Notice of Appeal to the First Circuit Court of Appeals seeking reversal of the summary judgments and directed verdicts granted by the district court. The court of appeals affirmed the summary judgments for Ava Strout and Carl Carlson; affirmed the directed verdict granted to Davis Goodine; and, affirmed the directed verdict granted to Petitioner Curtis on that part of Respondent's claim involving interference with her right to marry and custody of her child. The court of appeals reversed the summary judgment granted to Milo Community Hospital; reversed the directed verdict granted to the social workers and Roberta Sawtelle; and, reversed the directed verdict granted to Petitioner Curtis on that part of Respondent's claim dealing with the sterilization.

Petitioners now seek a writ of certiorari to review the decision of the court of appeals with respect to three issues: whether qualified immunity as outlined in *Wood* v. *Strickland*, 420 U.S. 308, 322, (1975), applies to the social workers; whether, in appiying the *Wood* test, the social workers and Dr. Curtis, to the extent that he is deemed to be a state actor, are entitled to qualified immunity as a matter of law; and, whether Dr. Curtis is a state actor by virtue of his position as Chief of Staff of Milo Community Hospital.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

A. The Opinion Below Conflicts with Decisions of this Court Regarding the Availability of Qualified Immunity to Public Officials Sued Under 42 U.S.C. § 1983.

The court of appeals, with Chief Judge Coffin dissenting, held that the district court erroneously assumed that the social workers were entitled to rely upon the qualified immunity available to other public officials under the test articulated in *Wood* v. *Strickland*, 420 U.S. 308 (1975). The majority relied on this Court's decisions in *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Imbler* v. *Pachtman*, 424 U.S. 409 (1976); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974) and *Wood*, *supra*, for its holding that qualified immunity measured by the test outlined in *Wood* is only available to "certain" public officials who meet the requirements of a two-fold inquiry. (Cert. App. 34-36) The court of appeals defined this inquiry as first requiring the district court to review the common law in order to determine whether or not the social workers fell within a class of public officials traditionally afforded immunity in actions similar to the cause of action asserted by the Respondent under 42 U.S.C. § 1983 and second requiring the district court to review the nature and range of responsibility of the social workers' positions in order to determine whether qualified immunity could be made available as a matter of public policy ". . . to avoid discouraging effective official action by public officers charged with a considerable range of responsibility and discretion." *Wood*, *supra*, at 317-18.

Although *Wood* provided qualified immunity in the specific context of school discipline, the court of appeals recognized that this Court has applied the *Wood* test to public

officials other than school board members in *O'Connor* v. *Donaldson,* 422 U.S. 563 (1975), and recently in *Procunier* v. *Navarette,* — U.S. —, 55 L.Ed2d 24 (1978), without engaging in the inquiry which the court of appeals believes is necessary in this action.

While the court of appeals recognized that this Court in *Procunier* without engaging in the so-called inquiry it wishes the district court to make allowed certain prison officials to assert the qualified immunity outlined in *Wood,* it rationalized this Court's application of the *Wood* test on the basis that a substantial body of law as to the right of prison officials to assert qualified immunity was already established thereby making the inquiry unnecessary. (Cert. App. 36-37) The court of appeals failed to point out that the defendants in *Procunier* included not only those prison officials with a wide range of discretion such as the warden and the director of the state department of corrections but also a member of the prison staff in charge of handling incoming and outgoing mail whose function arguably might not meet the second part of this "inquiry" allowing qualifield immunity on the basis of public policy where the official's actions involve a considerable range of responsibility and discretion. If qualified immunity, on the basis of public policy, is available to a prison mail clerk it is hard to conceive that it would be unavailable to social workers whose functions, as the substantial record in this case reveals, involved a great deal of discretion in providing a complex range of social services authorized by their employer, the Maine Department of Health and Welfare.

The majority recognized that numerous other courts of appeals " . . . have displayed little hesitancy in extending the qualified immunity to a variety of officials . . ." (Cert. App. 29-30) Chief Judge Coffin pointed out that in view of these numerous other public officials who have been

granted qualified immunity based upon *Wood* "[t]here seems little basis for distinguishing them [the social workers] in terms of public policy rationale . . ." (Cert. App. 40). Nevertheless the majority concluded that a remand was necessary to determine this "crucial" question. (Cert. App. 36)

Notably, Justice Stevens dissenting in *Procunier* stated that the Court's decision strongly implies that qualified immunity is available to all public officials. He agreed with this proposition stating that "[a] public servant who is conscientiously doing his job to the best of his ability should rarely, if ever, be exposed to the risk of damage liability." — U.S. —, 55 L.Ed.2d, at 35.

When this action was commenced the First Circuit applied a purely subjective test in determining the liability of public officials for money damages under 42 U.S.C. § 1983. That subjective test was outlined in *Gaffney* v. *Silk,* 488 F.2d 1248, 1250 (1st Cir. 1973), in which the defendants were town selectmen. The court stated, ". . . as to these officials, where independent judgment and discretion are involved, the courts have permitted only a qualified immunity based upon good faith performance of their duties as they saw them." In *Scheur,* this Court applied a similar subjective test in determining the availability of qualified immunity to executive officers. *Wood,* however, in the specific context of schoool discipline, added an objective factor to the subjective test applied in *Scheuer.* The dissenters in *Wood* pointed out that this objective factor ". . . appears to impose a higher standard of care upon public school officials, sued under § 1983, than that heretofore required of any other official." 420 U.S. at 327.

The social workers did not argue in either the district court or the court of appeals that the less stringent subjective tests of *Scheuer* or *Gaffney* applied to them but were

confident in allowing their actions to be carefully scrutinized in accordance with the stricter *Wood* test. The court of appeals opinion in this action indicates that their reliance may have been misplaced and has created a result which qualified immunity was designed, in part, to prevent. It has created the apprehension that the social workers' official actions even though taken in good faith fulfillment of their responsibilities may be punished and that therefore their discretion, unlike that of public school officials, should be exercised only with undue timidity, a result contrary to public policy and the opinions of this Court regarding qualified immunity. It is respectfully submitted that the opinion below should be reviewed because it conflicts with the decisions of this Court regarding qualified immunity.

B. The Social Workers and Petitioner Curtis, to the Extent that He is Deemed to be a State Actor, are Entitled to Qualified Immunity as a Matter of Law, Since the Law Regarding the Authority of Guardians Relative to the Personal Rights of Their Wards is Unsettled.

A review of the Petitioners' actions, if conducted in accordance with the *Wood* test, reveals that they are entitled to immunity as a matter of law thereby making a remand unnecessary. Since *Wood* clearly requires that the Petitioners either knew or should have known that the actions they took would result in the deprivations asserted by the Respondent before liability could attach, the availability of immunity can be decided as a matter of law by reviewing the state of the law at the time their actions took place.[2]

[2] No attempt is made here to analyze that part of the *Wood* test that would eliminate the availability of qualified immunity to the social workers if they acted with a " . . . malicious intention to cause a deprivation of constitutional rights or other injury to the [Respondent] . . . " 420 U.S., at 322, since the court below never reached that issue. While the majority, in a footnote (Cert. App. 36), indicated that the claims against the social workers should be resolved by the jury, the district court, having had the benefit of reviewing extensive discovery materials at the time it considered motions for summary judgment as well as having heard the Respondent's entire case at trial, concluded that there was no evidence showing " . . . bad faith, knowing misconduct or unreasonable action" by the social workers. (Cert. App. 8)

Although the opinion below addresses Petitioner Curtis' actions under this part of the *Wood* test, it is clear that the court's analysis (Cert. App. 30) does not disclose any inference of malicious intention in performing the sterilization. If, in fact, there was a failure to obtain whatever may be required as an informed consent under the circumstances of this case that is a matter which, as Reason C of this Petition indicates, might amount to negligence which is not actionable under 42 U.S.C. § 1983.

It is submitted that a review of the record by this Court will fail to disclose any inference of malice attributable to any of the Petitioners.

In determining whether they "should have known" they cannot be ". . . charged with predicting the future course of constitutional law," *Pierson, supra* at 557, however their actions cannot be justified by ". . . ignorance or disregard of settled, indisputable law. . ." *Wood, supra* at 322.

Recent decisions of this Court as well as other federal courts make it clear that the issues raised in this action lend themselves to no simple solution and remain unsettled to this day. Issues involving the relative rights of a guardian regarding control over the personal rights of his ward have posed great difficulty to the courts which have had to address them. The difficulties faced by the district court in *Relf* v. *Weinberger,* 372 F.Supp. 1196 (D.C.D.C. 1974) and *Relf* v. *Mathews,* 403 F.Supp. 1235 (D.C.D.C. 1975), demonstrate that the law in this area is not settled. The cases involved proposed HEW regulations which allowed the use of federal funds for the sterilization of mental incompetents at the request of the incompetent person's representative. Although the district court rejected the proposed regulations on several grounds, it did not discount the likelihood that a guardian or representative of an in-

competent might be able to consent to a sterilization operation. 403 F.Supp. at 1238. Indeed the court of appeals in this action indicated that ". . . it might be that a spendthrift guardian . . . has authority to consent." (Cert. App. 32) While there are cases dealing with the common law rights of parents to consent to the sterilization of their children, *A.L.* v. *G.R.H.*, 325 N.E. 2d 501 (Ind. 1975), and cases dealing with the jurisdiction of courts to order involuntary sterilizations, *Stump* v. *Sparkman*, __ U.S. __, 55 L. Ed. 2d 331 (1978), there are none dealing with the specific question which arose in this action, that is, did Roberta Sawtelle as guardian have the authority to consent to the sterilization of the Respondent. The record in this action clearly indicates that the social workers did not know whether the guardian could consent and merely advised all who asked the question to consult with an attorney and in one instance to consult with the probate judge who ordered the guardianship. Dr. Curtis assumed that the guardian was the appropriate person to execute the consent and believed that the Respondent had also consented.

Although the specific statutory section under which the Respondent was placed under guardianship indicated that she was a spendthrift, Maine law does not differentiate between the rights of guardians of spendthrifts and the rights of guardians of other incompetents. It provides that all guardians shall have the custody of the persons of their wards. Me. Rev. Stat. Ann. tit. 18, § 3605. (Cert. App. 43) A guardian has the authority to ". . . appear for and represent his ward in all legal proceedings unless another is appointed for that purpose as guardian or next friend." Me. Rev. Stat. Ann. tit. 18, § 3505. (Cert. App. 43) As guardian of both the person and the estate it would appear that Roberta Sawtelle had the authority to represent the Respondent in matters not only regarding her estate but her person. The parameters of this authority are not

clearly established in either Maine or constitutional law. By way of analogy, in the context of the commitment of minors to mental institutions, the court in *Bartley* v. *Kremens*, 402 F.Supp. 1039 (E.D. Pa. 1975), in attempting to decide whether or not parents, guardians or persons standing in *loco parentis* may effectively waive the personal rights of children, found that the question was both difficult and unique. In vacating and remanding that case to the district court this Court has yet to offer guidance on that difficult issue. *Kremens* v. *Bartley*, 431 U.S. 119 (1977).

The social workers' minimal discussions with the Respondent, her guardian and Davis Goodine concerning sterilization, marriage plans, and custody of her child, and Dr. Curtis' discussions with the Respondent and her guardian regarding sterilization, are discussions which this Court, as demonstrated in *Planned Parenthood of Missouri* v. *Danforth*, 428 U.S. 52 (1976), would encourage as long as the ultimate decision of the guardian does not act as a veto on the Respondent's exercise of her fundamental rights. The Respondent's own testimony in this case indicates that the only person she informed of her opposition to the sterilization was Petitioner Curtis (which raises an informed consent issue more appropriately addressed in the pending state court action which the Respondent has commenced against Dr. Curtis); that her guardian merely asked her to wait to get married and that she waited because she felt she should obey her sister; and, that although she now complains that she did not want her child to be placed in state custody, she never communicated that to the social workers. There is no evidence that the social workers were aware that the Respondent was in disagreement with any of the decisions she now claims were made against her will.

The actions of the Petitioners can hardly be characterized as actions taken in disregard of the settled and indisputable

constitutional rights of the Respondent and therefore they should be entitled, as a matter of law, to the protection afforded by a qualified immunity from money damages in this action. It is respectfully submitted that the opinion below should be reviewed because the court failed to consider that part of the *Wood* test which, if applied, would entitle the Petitioners to qualified immunity as a matter of law.

C. The Opinion Below Which Characterized Petitioner Curtis as a State Actor by Virtue of His Position as Chief of Staff of the Milo Community Hospital was Made Without Regard to and Contrary to This Court's Opinions in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), and *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974).

In finding Petitioner Curtis to be a state actor, the court of appeals engaged in a two-part inquiry through which it concluded that Milo Community Hospital was a state actor and that by virtue of his position as its Chief of Staff he was also a state actor. The court first found ". . . that the state has so insinuated itself into a position of interdependence with [Milo Community Hospital] that it must be recognized as a joint participant in the challenged activity, which, on that account cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment." (Cert. App. 20) In the second part of its inquiry, the court examined the by-laws of Milo Community Hospital which provide that "[r]esponsibility for operation and maintenance of the Hospital and evaluation of Hospital practices shall be a *joint effort* by the Board of Trustees, Administrator and the Chief of Staff, *each to be a check on the other.*" (Cert. App. 26) The by-laws further charged the Chief of Staff with the responsibility ". . . for the functioning of the clinical organization of the Hospital and [required that he] shall keep or cause to be

kept careful supervision over the clinical work of the Hospital." (Cert. App. 26)

Solely on the basis of his association with the hospital and without describing whether his role as Chief of Staff had any relationship, causal or otherwise, with the Respondent's 42 U.S.C. § 1983 claim, the court labeled him a state actor. In reaching its conclusion, the court of appeals totally ignored the reasoning in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), and *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974). In *Burton, supra* at 722, this Court held that state involvement must rise to a level of significance before the action of an otherwise private actor can be characterized as state action. In *Jackson, supra*, a 42 U.S.C. § 1983 action brought against a private utility company, the Petitioners claimed that the private utility was subject to state action treatment on the basis of extensive state regulation and the monopoly status occupied by it within its market area. The Court's opinion analyzed each aspect of the state's involvement with the private utility in order to determine whether in each instance there ". . . was a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may fairly be treated as that of the State itself." 419 U.S. at 351. The record in this action clearly demonstrates that the decision to sterilize the Respondent was one made between Dr. Curtis and the Respondent and that it in no way involved Dr. Curtis' position as Chief of Staff of the hospital where the sterilization operation happened to be performed. Dr. Curtis' position as Chief of Staff in no way affected the sterilization decision thereby satisfying neither *Burton's* significant state involvement test nor *Jackson's* "nexus" test.[3]

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[3] Notably the court of appeals in finding the hospital to be a state actor could find no "nexus" between the state and the challenged activity and therefore relied primarily on the test articulated in *Burton* (Cert. App. 25).

This Court's decision in *Monroe* v. *Pape,* 365 U.S. 167 (1961), is instructive in demonstrating the error in the court of appeals reasoning. *Monroe* would require that the alleged injury was made possible only because the wrongdoer misused power possessed by virtue of state law. *Id.* at 184. That power is totally lacking here.

The strongest inference that can be drawn from the evidence presented in this case is that Dr. Curtis' actions were negligent or amounted to malpractice. Negligence could arguably arise from Dr. Curtis' reliance on the consent of the guardian to perform the sterilization operation or from a failure to adequately supervise his own clinical work as the by-laws of the Milo Community Hospital might require. Neither negligence nor malpractice, however, are actionable under 42 U.S.C. § 1983. *Harper* v. *Cseer,* 544 F.2d 1121, 1124 (1st Cir. 1976) and *Paul* v. *Davis,* 429 U.S. 693, 698-9 (1976).

Assuming *arguendo* that Dr. Curtis is a state actor, he should not only be entitled to assert qualified immunity, which the court of appeals indicated applied to him (Cert. App. 30), but should also be granted immunity as a matter of law, since the law regarding the authority of a guardian to consent to a sterilization of his ward was and is far from clear as more specifically appears in Reason B of this Petition. It is respectfully submitted that the opinion below should be reviewed because of the court's failure to follow the decisions of this Court in either *Burton* or *Jackson,* in characterizing a purely private actor as a state actor for purposes of imposing liability under 42 U.S.C. § 1983.

CONCLUSION

For the reasons stated herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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June, 1978

Supreme Court, U. S.
FILED
JUN 27 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-1842

RUTH A. HAGAN, MARILYN B. DOW,
MARY LOU PATTISON

AND

JOHN CURTIS, M.D.,
Petitioners

v.

GEORGIA MAE DOWNS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

APPENDIX TO PETITION

BRUCE A. COGGESHALL
MALCOLM L. LYONS
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STATE OF MAINE

Piscataquis, ss.

DISTRICT COURT
DISTRICT THIRTEEN
Division of Piscataquis

Civil Action, Docket No. 72-88C

STATE OF MAINE
DEPARTMENT OF HEALTH & WELFARE

vs.

GEORGIA MAE GOODINE

Re: *Robert Scott Goodine*

This matter was heard by the Judge of the District Court on April 19, 1973. Richard Edwards, Esq. appeared for Davis Goodine, paternal grandfather of Robert. Georgia Mae Goodine, mother of Robert, appeared in her own behalf. Mrs. Roberta Sawtelle, sister of Georgia and Guardian of Georgia appeared in her own behalf and appeared as Guardian. Miss Pattison and Mrs. Marilyn Dow were present, representing the Department of Health & Welfare of the State of Maine. Mrs. Witham, housekeeper for Mr. Goodine, was also present.

The Health & Welfare offered testimony, to show that Georgia, a deaf mute, was physically unable to care for her child, and stated that they could and would provide a home suitable for the child — that eventually the child would be placed for adoption.

Davis Goodine stated that he and Mrs. Witham could and would care for the child, though Health & Welfare officials felt that their facilities were quite modest, to say the least.

They already have an older child of Georgia's and witnesses felt that the child was rather ill kept and unbridled.

Georgia, by means of written messages with the Court, stated that she wanted the child to go "with Mrs. Dow". She was very positive about this.

Upon hearing all of the testimony the Court decrees that the child be given to the State of Maine at this time as the Court feels it is for the best interests of the child.

Dated at Dover-Foxcroft, Maine this nineteenth day of April A.D. 1973.

MATTHEW WILLIAMS, Judge

Maine District Court #13
Division of Piscataquis

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE
NORTHERN DIVISION

GEORGIA MAE DOWNS
v.
ROBERTA SAWTELLE, et als. } CIVIL NO. 75-20-ND

BENCH RULING OF THE COURT UPON DEFENDANTS' MOTIONS FOR A DIRECTED VERDICT

Pursuant to notice, trial was commenced in the above-entitled action before Honorable Edward T. Gignoux, Judge, United States District Court, District of Maine, and a jury, at the United States Post Office & Courthouse, Bangor, Maine, on Monday, March 21, 1977. At the conclusion of the presentation of the plaintiff's evidence on Friday, March 25, 1977, after hearing all counsel upon defendants' motion for a directed verdict, the Court ruled from the bench upon the motions as follows:

APPEARANCES:

For the Plaintiff: Douglas A. Clapp, Esq. &
Michael J. Cunniff, Esq.
Attorneys at Law
Pittsfield, Maine

Stephen D. Clapp, Esq.
Attorney at Law
No. Attleboro, Mass.

For Defendant Sawtelle: John L. Eastman, Esq.
Attorney at Law
Dover-Foxcroft, Maine

APPEARANCES: (cont'd.)

For Defendants Hagan, Dow & Pattison:	Joseph M. Kozak, Esq. Asst. Attorney General Department of Human Services 221 State Street Augusta, Maine
For Defendant Curtis:	Malcolm L. Lyons, Esq. Attorney at Law Augusta, Maine
For Defendant Goodine:	Stephen H. Shook, Esq. Attorney at Law Milo, Maine

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(In open court at 4:40 o'clock, p.m.)

THE COURT: In this case, all defendants have moved at the close of the plaintiff's evidence for a directed verdict in their favor and dismissal of the action against them. Trial has been had of the cause of action set forth in Count I of the amended complaint, Count II having previously been dismissed. In ruling upon such a motion, the Court, of course, must accept the plaintiff's evidence in the light most favorable to the plaintiff. Applying this standard, the Court is persuaded that the plaintiff has failed to produce the requisite quantum of evidence to reach the jury with her claim.

In Count I of the amended complaint the plaintiff has set forth a claim for compensatory and punitive damages under the Civil Rights Act, 42 U.S.C. § 1983. Jurisdiction is predicated on 28 U.S.C. § 1343(3). The defendants are the plaintiff's sister, Roberta Sawtelle; the plaintiff's father, Davis A. Goodine; Dr. John B. Curtis, a general surgeon with an office in Milo, Maine; and three employees of the Maine State Department of Human Services — formerly entitled the Maine State Department of Health and

Welfare — Marilyn B. Dow, Ruth A. Hagan and Mary L. Pattison, whom the Court will hereafter refer to collectively as the State defendants.

The plaintiff charges that the defendants violated her constitutional rights by depriving her of her right to conceive and bear children, by depriving her of her right to raise her own child and by depriving her of her right to marry. Plaintiff specifically alleges that these deprivations occurred when defendants caused her to be sterilized, initially prevented and then delayed her from carrying out her marriage plans with Carroll Downs, her present husband, and removed her child, Robert Scott Goodine, from her, all without her consent.

At the outset, it must be noted that the federal Civil Rights Act, specifically, 42 U.S.C. § 1983, does not create a general federal law of torts. As Mr. Justice Rehnquist recognized, writing for the Court most recently in *Paul* v. *Davis*, 424 U.S. 693, 697-701 (1976), such a construction of § 1983 "would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under 'color of law' establishing a violation of the 14th Amendment." Moreover, a reading of the 14th Amendment due process clause to the effect that it should extend to every person a right to be free of injury wherever the state may be characterized as the tort-feasor would make the 14th Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states. *Cf. Griffin* v. *Breckenridge*, 403 U.S. 88, 101-102 (1971). *Paul* v. *Davis* definitely rejected such a construction of Section 1983. That case, as have numerous other decisions of the Supreme Court and lower federal courts, including the Court of Appeals for this Circuit, has made clear that in order for the plaintiff to establish an actionable claim against a defendant under § 1983

the plaintiff must show that the defendant deprived her of a right secured by the United States Constitution and that such deprivation was achieved by a defendant acting under color of state law. Further, it is established that in order to recover damages for such a deprivation, the plaintiff must show that the defendant acted with the requisite malice or bad faith. *Paul* v. *Davis, supra; Wood* v. *Strickland,* 420 U.S. 308 (1975); *O'Connor* v. *Donaldson,* 422 U.S. 563, 576-77 (1975); *Harper* v. *Cserr,* 544 F.2d 1121 (1st Cir. 1976).

Cases which have arisen under § 1983 have established certain principles which are applicable here. First, § 1983 does not afford a cause of action for negligence or malpractice. *Paul* v. *Davis, supra* at 698-701; *Harper* v. *Cserr, supra* at 1124.

Second, a defendant's possible violation of state law by failing to comply with state statutes does not necessarily mean that the plaintiff's federal rights have been invaded. *Paul* v. *Davis, supra,* at 700; *Screws* v. *United States,* 325 U.S. 91, 108 (1945); *Street* v. *Surdyka,* 492 F.2d 368, 371 (4th Cir. 1974). Mere failure to comply with state statutes does not, in and of itself, create the state action necessary to support a viable claim under § 1983.

Third, there can be no doubt, as the defendants here concede, that the deprivation of a person's ability to bear children, of a person's right to raise children, or of a person's right to marry are deprivations of constitutional rights which the State cannot accomplish without due process of law. *See, e.g., Skinner* v. *Oklahoma, ex rel. Williamson,* 316 U.S. 535, 541 (1942); *Cox* v. *Stanton,* 529 F.2d 47, 50 (4th Cir. 1975).

Fourth, the burden of establishing that the defendants deprived the plaintiff of a constitutional right, that the defendants were acting under color of state law, and that the defendants acted with the requisite malice or bad faith is on the plaintiff. *O'Connor* v. *Donaldson, supra; Wood* v. *Strickland, supra. See, Scheuer* v. *Rhodes,* 416 U.S. 232, 247-48 (1974); *Kermit Construction Corp.* v. *Banco Credito,* 547 F.2d 1 (1st Cir. 1976).

Fifth, the appropriate standard for determining whether or not a defendant acted in "good faith" contains both objective and subjective elements. Under the Supreme Court's decision in *Wood* v. *Strickland, supra,* the relevant question is whether the defendant "knew or reasonably should have known that the action he took within the sphere of his official responsibility would violate the Constitutional rights of the plaintiff, or if he took the action with the malicious intention to cause a deprivation of Constitutional rights or other injury to the plaintiff . . . A compensatory award will be appropriate only if the defendant has acted with such impermissible motivation or with such disregard of the plaintiff's clearly established Constitutional rights that his action cannot reasonably be characterized as being in good faith." 420 U.S. at 322.

Sixth, as this case involves both state and private defendants, the Court must determine the extent to which the private defendants, who acted in association with the state defendants, themselves acted "under color of state law." *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715 (1961), instructs that "only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance." 365 U.S. at 722.

Applying these established principles to the evidence which the plaintiff has presented as against the various individual defendants in this case, the Court will first consider the evidence as it relates to the actions of the State

defendants. It is conceded, and indeed entirely clear, that the State defendants as State employees were acting under color of State law in the actions which they took as disclosed by the record in this case. Plaintiff has failed, however, to establish by the evidence any significant State action that "caused" the deprivation of the constitutional rights of which plaintiff alleges she has been deprived. *Cf. Rizzo* v. *Goode,* 423 U.S. 362, 374-375 (1976). Further, the Court can find no evidence which would justify a finding by the jury that these defendants intentionally influenced or manipulated the actions of the private defendants through their State authority. More importantly, the plaintiff's evidence wholly fails to establish that any one of the three State defendants acted otherwise than in complete good faith and with the reasonable belief that the steps being taken in encouraging the placement of plaintiff's unborn child, in encouraging the delay of plaintiff's marriage, and in approving the proposed sterilization of the plaintiff were in accordance with the plaintiff's wishes and were proper and lawful. In short, a review of this record discloses no evidence from which a jury could reasonably conclude that the plaintiff has sustained her burden of showing "bad faith, knowing misconduct or unreasonable action" on the part of these defendants. *Hahn* v. *Sargeant,* 523 F.2d 461, 467 (1st Cir. 1975). Not only is there a complete absence of evidence that these defendants acted with any malice toward the plaintiff, but plaintiff's own evidence plainly shows that they acted in accordance with what they reasonably believed was their duty. The Court can only conclude on this record that to hold the State defendants liable would indeed be, in the words of the Court of Appeals for this Circuit, a "preposterous result." *Joyce* v. *Farrazzi,* 323 F.2d 931, 933 (1st Cir. 1963).

Turning next to the first of the private defendants, Dr. Curtis, the record discloses that the only actions taken by

Dr. Curtis were taken by him in his capacity as a private practicing physician providing medical care and advice to the Goodine family. As such, his actions were those of a private citizen, and he clearly is not one of the class of persons exposed to liability under § 1983. *Joyce* v. *Farrazzi, supra; Byrne* v. *Kysar,* 347 F.2d 734 (7th Cir. 1965), *cert. denied,* 383 U.S. 913 (1966), *Sebastian* v. *United States,* 531 F.2d 900 (8th Cir. 1976). *See also Francis* v. *Lyman,* 216 F.2d 583, 588 (1st Cir. 1954). *Compare, DeLatte* v. *Genovese,* 273 F.Supp. 654, 656-57 (E.D. La., 1967), (the doctor in question was found to have been acting in his official capacity as an elected coroner, a public official.) Moreover, to the extent that Dr. Curtis would be entitled to the defense of qualified immunity otherwise available to a State official, *but see Kermit Construction Corp.* v. *Banco Credito, supra,* at 3, plaintiff has failed to meet her burden of showing that Dr. Curtis acted with malice or otherwise in bad faith. With respect to the plaintiff's claim against Dr. Curtis, the Court again wishes to emphasize that § 1983 does not afford a cause of action for malpractice or negligence. The Court is aware that there is pending in a court of the State of Maine an action brought by this plaintiff through the same counsel against Dr. Curtis predicated upon alleged malpractice and negligence, a state tort. In ruling, as the Court does now, that the present evidence does not establish a § 1983 cause of action, the Court is expressing no view whatsoever as to what, if any, liability may rest upon Dr. Curtis in the State court action.

With respect to the next defendant, Roberta Sawtelle, the evidence establishes that the only actions taken by her were also those of a private citizen. As such, she was not acting under color of State law and is not one of the class of persons exposed to liability under § 1983. Moreover, to the extent that she as a private person would be entitled

to the defense of qualified immunity available to a public official, the plaintiff has failed to meet her burden of showing that Mrs. Sawtelle acted with malice or otherwise in bad faith.

The remaining defendant is Davis Goodine. As to Mr. Goodine, the record is devoid of evidence that he in any way participated in the various actions of which the plaintiff complains after October 31, 1976. His guardianship petition was rejected by the Probate Court and Mrs. Sawtelle was appointed as plaintiff's guardian. Thus, there is no basis in the evidence from which a jury could conclude that he "caused" any deprivation of plaintiff's constitutional rights. Moreover, as with Mrs. Sawtelle, the evidence discloses that the only actions taken by Davis Goodine were taken by him as a private citizen, and as such he is not one of the class of persons exposed to liability under § 1983. To the extent that his actions may have taken in association with the State defendants, and if he would be entitled to the defense of qualified immunity available to public officials, the plaintiff has failed to meet her burden of showing that Mr. Goodine acted with malice or otherwise in bad faith.

The Court has only two further comments: (1) the plaintiff's contention that the defendants "conspired" to deprive her of constitutional rights is not supported by the evidence: (2) the plaintiff's charges, as restated in the recent amendment to the complaint, that the private defendants "collaborated" with the State defendants to deprive her of constitutional rights cannot survive the determination that the plaintiff has not established a § 1983 claim against the State defendants. *Hahn* v. *Sargeant, supra* at 468.

In conclusion, the Court wishes to emphasize its initial observation Section 1983 does not convert every action which has traditionally been a tort under State law into a

federal cause of action. It is apparent that the plaintiff, through her counsel, has attempted that conversion in this case. Whether or not any or all of these defendants are liable to this plaintiff for tortious conduct — malpractice, negligence or intentional infliction of injury — under the law of the State of Maine will presumably be determined in the State court action filed by the plaintiff now pending in the Somerset County Superior Court. The Court's determination in granting the present motions is no more than that the plaintiff's evidence is insufficient to justify a finding by the jury that any of these defendants are liable to her for damages under the Civil Rights Act, 42 U.S.C. § 1983.

The defendants' motions for a directed verdict are granted. Judgment will be entered dismissing the action, with prejudice and with costs.

• • •

To the extent that a transcript of the Court's ruling is desired, the Court reserves its usual privilege of editing a bench ruling, which undoubtedly contains mis-citations, grammatical errors, but hopefully not errors of substance.

Is there anything further?

(All defendants' counsel reply in the negative.)

MR. STEPHEN CLAPP: No, your Honor.

THE COURT: May the Court say that it has been a pleasure to have worked with counsel, both the Messrs. Clapp and Mr. Cunniff for the plaintiff and the battery of lawyers for the defendants. The Court appreciates the expedition, courtesy and competence with which this matter has been presented during this rather long week.

Court will be in recess until 11 o'clock on Monday morning.

(Whereupon, this bench ruling was concluded at 5:15 o'clock, p.m.)

CERTIFICATE

I hereby certify that the foregoing bench ruling in the above-entitled action, which proceedings were reported verbatim by me on the date indicated heretofore, is true and correct, subject, however, to editing by Judge Gignoux prior to release.

HARRY B. DERRY
Official Court Reporter

United States Court of Appeals for the First Circuit

No. 77-1260

GEORGIA MAE DOWNS,
PLAINTIFF, APPELLANT,
v.
ROBERTA SAWTELLE, et al.,
DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE
[HON. EDWARD T. GIGNOUX, *U.S. District Judge*]

Before COFFIN, *Chief Judge*,
TUTTLE, *Circuit Judge*,*
WOLLENBERG, *District Judge*.**

Stephen D. Clapp, with whom *Armstrong, Pollis & Clapp, Douglas A. Clapp, Michael J. Cunniff*, and *Stitham, Clapp & Cunniff* were on brief, for appellant.

Stephen H. Shook, with whom *Edgerly & Shook* was on brief, for Davis A. Goodine, appellee.

Joseph M. Kozak, Assistant Attorney General, for Ruth A. Hagan, Marilyn B. Dow, and Mary Lou Pattison, appellees.

John L. Easton, Jr., with whom *C. W. & H. M. Hayes* was on brief, for Roberta Sawtelle, appellee.

Phillip D. Buckley, with whom *Rudman, Winchell, Carter & Buckley* was on brief, for Carl H. Carlson, appellee.

Malcolm L. Lyons, with whom *Wathen & Wathen* was on brief, for John B. Curtis, appellee.

John M. Wallach, with whom *Rudman, Winchell, Carter & Buckley* was on brief, for Milo Community Hospital and Ava Strout, appellees.

March 30, 1978

*Of the Fifth Circuit, sitting by designation.
**Of the Northern District of California, sitting by designation.

COFFIN, *Chief Judge.* Georgia Mae Downs, a deaf mute mother of two children born out of wedlock, brought this action for damages under 42 U.S.C. § 1983, alleging a conspiracy to sterilize her against her will, to delay her marriage to her present husband, and to remove her second child from her custody, all in violation of her constitutional rights. Before trial, summary judgment was granted to defendants Milo Community Hospital, where the operation was performed, its administrator, Ava Strout, and the town manager of Milo, Maine, Mr. Carlson, who authorized payment for the sterilization out of municipal funds. At the close of the plaintiff's evidence before a district court jury, verdicts were directed for defendants, Roberta Sawtelle, plaintiff's sister and spendthrift guardian[1]; Dr. John Curtis, the Chief of Staff of Milo Community Hospital and attending surgeon at the operation; three social workers of the state of Maine Department of Health and Welfare, who approved and helped arrange the guardianship proceedings, custody surrender, and sterilization; and Davis Goodine, the plaintiff's father. Plaintiff now appeals.[2]

This was an exceptionally confusing and emotional case. The district court was required to deal with a large quantity of conflicting evidence and extraordinary problems of communication. Our discussion will not fairly reflect these problems, for, in accordance with the standards for appellate review of orders disposing of a case by summary judgment and directed verdict, we present the evidence in the light most favorable to the plaintiff. *See Adickes* v. *Kress*

[1] Under 18 M.R.S.A. § 3601(2) a spendthrift guardian may be appointed for adults who "so spend or waste their estate as to expose themselves or families to want or suffering or their towns to expense."

[2] We affirm the judgment of the district court as to defendants Strout, Goodine and Carlson. Our review of the record makes it plain that their conduct, which amounted to no more than mere negligence, is not actionable under section 1983. *See Paul* v. *Davis,* 424 U.S. 693, 700-701 (1976).

& Co., 398 U.S. 144, 157 (1970); *Wilson* v. *Nooter Corp.,* 475 F.2d 497, 501 (1st Cir. 1973).

Although she was apparently born with normal hearing, plaintiff became deaf at age three, when hot coffee scalded her ear. Her primary and secondary school years were spent at the Governor Baxter State School for the Deaf. Although plaintiff was instructed in American Sign Language and taught to read and write, communication with her was frequently quite difficult. Tests showed her to have the reading comprehension of a fourth grader and borderline or dull normal intelligence.

Following her graduation from the Baxter School at age 18, plaintiff returned to her home town of Milo, Maine. Her social behavior provoked considerable conflict among the members of her family. At age 19, plaintiff gave birth to her first out-of-wedlock child. She cared for it for a time, but later surrendered it to her father, who obtained legal custody of the child and boarded it with his girl friend. Marilyn Dow, a state social worker assigned to plaintiff's case, and Dr. Curtis, the family physician, attempted to introduce plaintiff to various methods of contraception, but fifteen months after the birth of her first son, plaintiff was again pregnant.

The prospect of a second child gave rise to two concerns: placement of the baby and prevention of future pregnancies. Plaintiff's father petitioned the state probate court to be appointed her guardian in order to place the second child with its half-brother. Roberta Sawtelle opposed her father's petition and, with the backing of Mrs. Dow, herself sought appointment as plaintiff's spendthrift guardian, with a view to surrendering the child for adoption. At some point Sawtelle learned that plaintiff planned to marry Carroll Downs and wanted to have children with him. Although Downs was not the father of the child plaintiff was carry-

ing, he intended to keep it after his marriage to plaintiff and wanted it to bear his name. Dow and Sawtelle, however, were aware that the existence of a husband could impede efforts to have the child adopted, and they agreed that Sawtelle would persuade plaintiff and Downs that her consent to the marriage was required and would withhold it until after the baby's birth.

There is conflicting evidence as to the origin of the idea to have plaintiff sterilized. Social worker Mary Lou Pattison asserted that the father contacted the Department of Health and Welfare for help in coping with plaintiff's second pregnancy and for state funds to pay for the sterilization. However, the father's deposition and the agency's own reports indicate that the agency initiated the idea. Sawtelle, who had herself been sterilized, seems to have favored it from the beginning. In any event, it was Dow who assumed responsibility for contacting Dr. Curtis about medical preparations for the operation and arranged to have the town of Milo assume the necessary medical expenses.

As plaintiff's pregnancy progressed, sterilization was repeatedly proposed to her by Dr. Curtis and her sister, who accompanied her on each prenatal visit. Attempts to explain the meaning of sterilization through handwritten notes from the doctor and sign language interpretation by Sawtelle met with considerable difficulty. Dr. Curtis and Sawtelle asserted that plaintiff ultimately understood that sterilization meant she would have "no more babies" and that she agreed with the proposal. Plaintiff insisted that, to the extent of her limited ability to communicate, she registered her opposition but Sawtelle and the doctor continued to discuss plans for the sterilization. Some time before the operation was to be performed, plaintiff wrote a letter to Dr. Curtis which, although difficult to decipher,

expressed her plan to marry Carroll Downs and her wish to have additional children with him.[3] Dr. Curtis testified at trial that he treated the letter "so lightly that I didn't attach too much importance to it." He continued to make the necessary arrangements for the operation.

There was considerable testimony, much of it confusing and contradictory, as to the authority under which the operation was actually performed and the understanding of the participants in that regard. The policy of Milo Community Hospital, of which Dr. Curtis was Chief of Staff, permitted sterilizations in any of six circumstances. It was conceded that only one of them, mental retardation, could even arguably apply to the plaintiff. Dr. Curtis testified, however, that he did not consider plaintiff to be feeble-minded or retarded and that he had not read any test results indicating she was either. Yet Dr. Curtis' hospital report recommended sterilization "based 90% on this girl's low mentality involving poor judgment and her lack of restraint on sex appetite and its consequences."

Dr. Curtis requested that two other physicians consult with him on the case. Their written reports were devoid of any medical analysis or any indication that plaintiff consented to the operation. One physician concluded, without elaborating, that plaintiff "apparently lack[ed] ability to curtail normal appetite for sex", that she was "[p]otentially dangerous", and that her low economic earning power demonstrated "irresponsibility". The second physician's report stated, "uncontrolled appetite leads to promiscuity. Apparently retarded. Incapable of functioning in a maternal role."

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[3] The letter read: "My Boyfriend Carrol Downs said he want my baby two family agains. I will get married on March 3 over Carroll want me to new baby agains ok. I want Baby agains to 2 my family."

Hospital policy also required that the patient and another party (the form suggests a spouse) sign a standardized sterilization consent form. Although plaintiff signed other minor forms on her entry into and discharge from the hospital, she was never approached to sign the sterilization consent form. Indeed none of the defendants attempted to explain the form to her, although Dr. Curtis conceded that it could have been explained in terms she could have understood. Instead of plaintiff, her spendthrift guardian, Sawtelle, signed the form.

Dr. Curtis testified that he relied on the guardian's consent to perform the operation, although he had never before done so. Some time prior to the operation he asked social worker Marilyn Dow who could legally consent to the operation. Although Dow suggested that he obtain that information from the probate judge, the doctor ignored the advice and made no other effort to determine the legal prerequisites for an operation of this nature. He relied on his memories from medical school and his internship, which concluded in 1937, that a guardian's consent sufficed.

According to Dr. Curtis, plaintiff at all times indicated her consent to be sterilized. There is considerable dispute as to her agreement as the time for the operation approached. Plaintiff testified that the night before she was to be sterilized she informed Dr. Curtis she did not want the operation. That same evening her fiance communicated to Sawtelle and the doctor both plaintiff's opposition and his own.[4] A newspaper reporter who later covered the story testified that he discussed the operation with Dr. Curtis, who said he "went up later to talk with Georgia and, although she was opposed at first, . . . she eventually agreed to the sterilization." According to the reporter, the doctor observed, "She follows what the last person says to her."

[4] According to Downs' deposition, Dr. Curtis replied, "You cannot stop me on the operation."

On March 20, 1973, plaintiff gave birth to a baby boy, Robert Scott Goodine. Four days later she was sterilized by means of a fallotomy. From that day forward she has been permanently incapable of bearing children. Plaintiff was not permitted to see her child after its birth, despite her requests to do so. The child was removed from the hospital by Mary Pattison and placed in a foster home.

The authorization for taking the child is also in dispute. Before the birth of the child, the Maine Attorney General had advised the state social workers that plaintiff's guardian could not legally consent to the adoption of plaintiff's child. The day the child was taken from the hospital, Roberta Sawtelle signed an Agreement of Responsibility for Temporary Care of the baby. Six days later a petition for temporary termination of custody was filed with the probate court. A hearing was set for April 19, but no interim custody order was entered. At the April 19 hearing the probate court ordered that plaintiff's child be placed in the temporary custody of the state of Maine.

From the birth of the child until April 19, the only authority the state's social welfare employees had for keeping the child from its mother was the Agreement of Responsibility for Temporary Care signed by plaintiff's guardian. One of the social workers, Miss Hagen, testified that the use of such an Agreement was not unusual.

At the present time plaintiff is married to Carroll Downs. The spendthrift guardianship has been dissolved and the custody of Robert Scott Goodine has been restored to her.

I. STATE ACTION

The threshold question for our analysis is whether Milo Community Hospital can be considered a "state actor" for the purposes of § 1983 liability.[5] The district court

[5] The Second Circuit has adopted a flexible approach to state action analysis, providing for less rigorous scrutiny in racial discrimination cases.

did not rule on this issue although it intimated that the weight of authority is to the contrary. The issue is far from simple. For the past sixteen years courts have struggled to follow the admonition of the Supreme Court in *Burton* v. *Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961) that "[o]nly by sifting facts and weighing circumstances" can the legal significance of state involvement in private conduct be determined. On balance we conclude from the record at this stage of the proceedings that the "State has so insinuated itself into a position of interdependence with [Milo Community Hospital] that it must be recognized as a joint participant in the challenged activity, which, on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth Amendment." *Id.* at 725.

The involvement of the state in the operation of Milo Community Hospital is multi-faceted. Thirty percent or more of its operating budget resulted from Medicare funds. The hospital was subject to significant governmental regulation. The entire board of directors subsequent to the original incorporators was appointed by the Board of Selectmen of the town of Milo. Any profits earned by the hospital are to be distributed to the town of Milo. If the hospital should be dissolved, all assets after payment of debts revert to the town of Milo.

Appellees present an imposing array of cases holding that partial governmental funding of a hospital and the

See *Weise* v. *Syracuse University*, 522 F.2d 397, 406 (1975) ("A consideration of whether there is state action necessarily entails a balancing process. As the conduct complained of becomes more offensive, and as the nature of the dispute becomes more amendable to resolution by a court, the more appropriate it is to subject the issue to judicial scrutiny.") We have expressed our reservations to this approach, in *Lamb* v. *Rantoul*, 561 F.2d 409, 411 (1st Cir. 1977). Even were we to adopt such an approach, however, we would be inclined to group infringements of fundamental rights and racial discrimination together for the purpose of state action analysis just as they receive comparable scrutiny in equal protection cases.

fact that it is subject to general state regulation does not transform a private hospital into a state actor.[6] We have carefully examined these decisions. However, even the case with the strongest indicia of state action of all those cited, *Greco* v. *Orange Memorial Hospital Corp.*, 513 F.2d 873 (5th Cir. 1975), presents state involvement of considerably less magnitude than the present case.[7]

[6] Appellees Milo Community Hospital and Ava Strout cite the following cases in which hospitals were held *not* to be state actors: *Chrisman* v. *Sisters of St. Joseph of Peace*, 506 F.2d 308 (9th Cir. 1974) (hospital received 13% of its construction budget from Hill-Burton and HEW funds, received state tax exemptions, and was generally regulated by the state); *Ascherman* v. *Presbyterian Hospital of Pacific Medical Center*, 507 F.2d 1103 (9th Cir. 1974) (hospital received Hill-Burton funds and federal and state tax exemptions — no agency of the state selected or was represented on its governing board); *Briscoe* v. *Bock*, 540 F.2d 392 (8th Cir. 1976) (hospital was non-profit and tax exempt, was subject to extensive state regulation, received Hill-Burton funds, and was a member of a county health planning agency, (Alliance for Regional Community Health)); *Taylor* v. *St. Vincent's Hospital*, 523 F.2d 75 (9th Cir. 1975) (hospital was non-profit, received tax benefits and Hill-Burton funds, and was alleged to be the only hospital in the area); *Jackson* v. *Norton-Children's Hospital, Inc.*, 487 F.2d 503 (6th Cir. 1973) (hospital received Hill-Burton funds and was regulated by the state); *Doe* v. *Bellin Memorial Hospital*, 479 F.2d 756 (7th Cir. 1973) (hospital received Hill-Burton funds and was regulated by the state); *Allen* v. *Sisters of Saint Joseph*, 361 F. Supp. 1212 (N.D. Texas 1973) (hospital received Hill-Burton funds, was licensed by the state, received welfare funds, and was tax exempt); *Barrett* v. *United Hospital*, 376 F. Supp. 791 (S.D.N.Y. 1974) (hospital received Hill-Burton funds, was tax exempt, was subject to extensive state regulation).

[7] In *Greco* the hospital facility, publicly financed and owned by the county, was leased for a *de minimis* fee to a non-profit, tax exempt hospital. The hospital was obligated by the lease to accept indigent patients but was given complete control over its medical policies and quality of care provided. In the case at bar, the hospital's board is, as we have noted, controlled by the town. Here also, the town has the right to receive profits and to the extent that the sterilization of indigents relieved both the town and the hospital of providing uncompensated obstetrical services and caring for indigent children in the future, the town did stand to benefit financially from the operation. Finally, it should be noted that the court in *Greco* (which divided on the issue of state action), concluded that the fact that the hospital was not accused of racial discrimination should make it more difficult to establish that the hospital was a state actor. As we have noted, *see* note 4 *supra*, we would, in this setting, equate racial discrimination with deprivation of a fundamental right for the purposes of state action analysis.

More important, there is a wide range of authority suggesting that the indicia of state involvement here, aside from partial funding and general regulation, are more than sufficient to support liability under § 1983. The most compelling factor is the power of the Milo selectmen to appoint the hospital's board of directors. Two Supreme Court cases, *Evans* v. *Abney,* 396 U.S. 435 (1970), and *Pennsylvania* v. *Board of Trustees,* 353 U.S. 230 (1956), found that discriminatory conduct by institutions of which city or state agencies are trustees was discrimination by the state. The fact that in the present case, the town of Milo only appointed the trustees as opposed to serving on the board itself, does not diminish this nexus between the hospital's operation and the town. In evaluating a private foundation, four of whose seven man board were appointed by state officers, the Second Circuit concluded:

> "Even indirect governmental participation in the management of an organization is persuasive evidence of the existence of 'state action' where that participation is both substantial and other than neutral . . . [H]ere public officials, named in their ex officio capacities, control the selection of a majority of the governing body, and the Buffalo Foundation appears to have established this procedure for the very purpose of involving the public in its activities. This participation is neither insignificant nor neutral. Therefore, as to the Buffalo Foundation, a finding of 'state action' may be warranted even if the court should find only some other significant evidence of 'state action' ". *Jackson* v. *Statler Foundation,* 496 F.2d 623, 635 (2d Cir. 1974).

Other courts have also held that the appointment by the state of a majority of an institution's board is either determinative of state action or an important factor in establishing state action. *See Meredith* v. *Allen County War Memorial Hospital,* 397 F.2d 33 (6th Cir. 1968); *Chiaffitelli* v. *Dettmer Hospital, Inc.,* 437 F.2d 429 (6th Cir. 1971); *O'Neill* v. *The Grayson County War Memorial Hospital,* 472 F.2d 1140 (6th Cir. 1973); *Isaacs* v. *Board of Trustees of Temple University,* 385 F. Supp. 473 (E.D. Penn. 1974); *Braden* v. *University of Pittsburgh,* 392 F.Supp. 118 (W.D. Penn. 1975). In *Assum* v. *Good Samaritan Hospital,* 395 F.Supp. 363 (D. Ore.), *aff'd,* 542 F.2d 792 (9th Cir. 1976), the court concluded that the appointment of three of seven directors of the hospital's board by city, county and state officials did not make the hospital a state actor, but the court also specifically distinguished *Jackson* v. *Statler Foundation, supra,* as involving state appointment of a *majority* of the board, while the Oregon hospital only had a minority of its board appointed by the state. Similarly, we did not find the Rhode Island School of Design to be a state actor, although five of its forty-three directors were required to be state or city officials.[8] *See Lamb* v. *Rantoul,* 561 F.2d 409 (1st Cir. 1977). The crucial fact, as noted previously, is that the town of Milo appoints the entire board of Milo Community Hospital.

Although the other aspects of state involvement do not appear to us to be as critical as the appointment of the Board of Directors, they nevertheless offer additional support for our conclusion. Other courts have found that ownership by the city or state of a reversionary interest in an institution's property is an important factor in finding state action. *See Hampton* v. *City of Jacksonville,* 304 F.2d 320 (5th Cir. 1962); *Eaton* v. *Gibbs,* 329 F.2d 710 (4th Cir. 1964). Moreover, the distribution of the hospital's

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[8] On the other hand, in *Rivas Tenorio* v. *Liga Atletica Interuniversitaria,* 554 F.2d 492 (1st Cir. 1977), we found defendant athletic league to be a state actor despite its financial self-sufficiency in part because a majority of the league's directive board was composed of representatives of public institutions.

profits, if any, to the town of Milo represents the very kind of mutually beneficial relationship which formed the basis of state action in *Burton*.

Appellees' reliance on *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974), is not persuasive. The *Jackson* Court dealt with a private utility and held that the combination of extensive regulation by the state and a monopoly position do not justify a finding of "state action", unless "there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself." *Id.* at 351. If this nexus analysis was required to establish state action in any context, *Burton*, which based its holding on purely passive state involvement, would be overruled. However, *Jackson* specifically reaffirmed *Burton's* vitality in cases where, after searching scrutiny, a true symbiotic relationship can be said to exist. As the Second Circuit has explained:

> "Although *Jackson* stressed the failure to establish that Pennsylvania was directly involved in the challenged activities of [the public utility] — an emphasis which was far from novel . . . the Court took pains to stress that the absence of any proof of state initiation or enforcement would not necessarily be dispositive in all cases. It recognized the continued viability of the principle enunciated in *Burton* v. *Wilmington Parking Authority* . . . and *Moose Lodge* . . . that where the state goes beyond mere regulation of private conduct, and becomes in effect a 'partner' or 'joint venturer' in the enterprise, the inference of state responsibility for the proscribed conduct could more easily be made." *Holodnak* v. *Avco Corp., Avco-Lycoming Div., Stratford*, 514 F.2d 285, 288 (2d Cir. 1975) (suit under §301 of the Labor-Management Relations Act, 29 U.S.C. §185).

See also Braden v. *University of Pittsburgh*, 392 F. Supp. at 125.

The essence of *Burton* which survives *Jackson* is that the relationship between the state and the private institution may be so intertwined that the state will be held responsible for conduct of the institution with which it had no direct connection.[9] In this respect the present case is similar to *Fortin* v. *Darlington Little League, Inc.*, 514 F.2d 344 (1st Cir. 1975), in which we held that despite the city's lack of participation in formulating the discriminatory policy of the defendant, there was sufficient involvement with defendant's activities in general to subject the defendant to the Fourteenth Amendment. Here, although Milo Community Hospital is not technically a lessee or privileged user of a public entity's facility, its position is no less intertwined. The town's appointment of the entire board, general governmental support and regulation of the hospital, the town's right to receive profits and, on dissolution, the hospital's assets, together constitute such a close relationship that the conduct of the hospital must be attributed to the government even though a "nexus" in the *Jackson* sense is not present.[10]

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[9] *See Judicial Review of Private Hospital Activities*, 75 Mich. L. Rev. 445, 463 (1976) ("It would seem entirely proper, however, when no nexus is found, for a court then to weigh all the circumstances of the case and appropriately hold that the state is involved in the otherwise private activity to such a significant extent that state action must be found under *Burton*. It is this 'non obvious involvement of the state in [the] private conduct' that has been overlooked in many recent decisions, including perhaps the *Jackson* decision itself.").

[10] There is evidence in the record to the effect that the town of Milo paid the expenses for the sterilization operation performed on the plaintiff. However, it is unclear to us how much, if any, discretion was exercised by the town in determining to make the payment. If not all

The district court ruled that Dr. Curtis acted "in his capacity as a private practicing physician" in sterilizing plaintiff and as such his conduct was beyond the remedial scope of § 1983. Since summary judgment had already been granted for Milo Community Hospital, we do not know whether the district court's characterization of Dr. Curtis as a private party is a consequence of its earlier decision or whether the court believed that Dr. Curtis was acting in a private capacity even if the hospital was found to be a state actor.

Having determined that the hospital was a state actor, however, we must decide if the connection between Dr. Curtis and the Milo Community Hospital was such that the doctor's conduct should also be characterized as state action. Dr. Curtis was not simply a private physician making use of the hospital's facilities at the time of the sterilization operation. He was also Chief of Staff of the hospital. Article XVIII of the by-laws of the hospital state: "Responsibility for the operation and maintenance of the Hospital and evaluation of Hospital practices shall be a *joint effort* by the Board of Trustees, Administrator, and the Chief of Staff, *each to be a check on the other.*" (Emphasis added.) Article V Sec. II of the By-Laws, Rules, and Regulations of The Medical Staff of Milo Community Hospital, Inc., describes the functions of the Chief of Staff even more explicitly: "He shall be responsible for the functioning of the clinical organization of the hospital and shall keep or cause to be kept careful supervision over the clinical work of the hospital."

Just as agents and employees of state hospitals may be sued under § 1983, *see Fitzgerald* v. *Porter Memorial Hospital,* 523 F.2d 716, 718-19 n. 7 (7th Cir. 1975); *Spence* v. *Staras,* 507 F.2d 554 (7th Cir. 1974); *Harper* v. *Cserr,* 544 F.2d 1121 (1st Cir. 1976), agents and employees of private hospitals determined to be state actors are similarly liable. We do not see how Dr. Curtis can be held to be divorced from his official and responsible role at Milo Community Hospital simply because he is also administering directly to a patient.[11] As Chief of Staff of Milo Community Hospital with duties designated by its by-laws, Dr. Curtis must also be held to be subject to § 1983 liability.

In summary, we conclude that both the Milo Community Hospital[12] and Dr. Curtis were "state actors" for purposes of section 1983. The social workers were, of course, state employees at the time of their involvement in plaintiff's case and acted in their official capacities. Sawtelle also acted under color of state law, since her actions were taken in concert with state officials. *Adickes* v. *S.H. Kress & Co.,*

indigents' hospital bills were paid by the town as a matter of course and if plaintiff's bill was paid as a matter of discretionary judgment, such facts would point to a nexus between the town and the hospital as to the specific conduct complained of.

[11] The cases cited by the trial court in its bench ruling do not persuade us to the contrary. *Joyce* v. *Ferrazzi,* 323 F.2d 931 (1st Cir. 1963) and *Byrne* v. *Kysar,* 347 F.2d 734 (7th Cir. 1965), both involve physicians whose only official relation to the plaintiff in their respective cases was in certifying him for commitment to a mental institution pursuant to state statutes. Here Dr. Curtis' responsibilities at Milo Community Hospital are of a general supervisory nature and cannot be ignored. In *Sebastian* v. *United States,* 531 F.2d 900 (8th Cir. 1976), claims against a legal aid attorney were dismissed because she was not acting under color of state law; but there is no discussion to indicate the basis for the court's conclusion. Also, hospital employees were held not to be under § 1983 both because they acted pursuant to a facially valid court order and because they were federal and not state employees. Again the decision of this case does not appear to be applicable to the facts before us.

[12] In *Santiago* v. *Corporacion de Renovacion Urbana Y Vivienda de Puerto Rico,* 554 F.2d 1210 (1st Cir. 1977), we discussed whether the defendant, a public body created by the Commonwealth of Puerto Rico, was a "person" under section 1983 in light of *Monroe* v. *Pape,* 365 U.S. 167 (1961) and *City of Kenosha* v. *Bruno,* 412 U.S. 507 (1973). Implicit in the entire discussion was the belief that aside from *Monroe* v. *Pape* municipal immunity, a corporate or institutional entity may be fully liable under section 1983. No party has suggested nor do we see any reason to conclude that Milo Community Hospital is not a person subject to suit for the purposes of this action.

398 U.S. 144, 152 (1970); *Smith* v. *Brookshire Brothers, Inc.*, 519 F.2d 93, 94 (5th Cir. 1975). We must now determine if and to what extent any of these defendants are immune from liability for damages.

II. IMMUNITY

Section 1983 provides that "[e]very person" who, acting under color of state law, deprives another of a constitutional right is answerable to the injured party in a suit for damages.[13] On its face, "[t]he statute thus creates a species of tort liability that . . . admits of no immunities." *Imbler* v. *Pachtman*, 424 U.S. 409, 417 (1976). On several occasions, however, the Supreme Court has rebuffed attempts to apply the statute as strictly as it reads. Specifically, the Court has held that legislators and judges enjoy absolute immunity from § 1983 damage liability for acts performed in their official capacities. See *Pierson* v. *Ray*, 386 U.S. 547, 554-55 (1967) and *Bradley* v. *Fisher*, 80 U.S. (13 Wall.) 335, 344-57 (1872) (judges); *Tenny* v. *Brandhove*, 341 U.S. 367, 372-79 (1951) (legislators). More recently the Court extended a similar immunity to prosecutors for actions taken in connection with "initiating a prosecution and . . . presenting the State's case." *Imbler* v. *Pachtman*, *supra*, 424 U.S. at 431.

These decisions were grounded in part upon the reasoned conclusion that in enacting § 1983 the Reconstruction Congress did not intend "to abolish wholesale all common-law immunities." *Pierson* v. *Ray*, 386 U.S., *supra*, at 554. To

[13] The statute provides as follows:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983.

date, however, the Court has jealously guarded the protection accorded judges, legislators and prosecutors to the extent that no other state officials have been cloaked with absolute immunity. Instead the Court has sanctioned a "qualified immunity" which shields certain state actors from damage liability for official actions found to have been taken in "good faith." *O'Connor* v. *Donaldson*, 422 U.S. 563 (1975); *Wood* v. *Strickland*, 420 U.S. 308 (1975); *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974); *Pierson* v. *Ray*, *supra*. As the Court said in *Wood*, an official entitled to assert the immunity will be subject to liability for damages under § 1983.

> "if he knew or reasonably should have known that the action he took within the sphere of his official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the [plaintiff]. . . . A compensatory award will be appropriate only if the [defendant] . . . acted with such an impermissible motivation or with such disregard of the [plaintiff's] clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith." 420 U.S. at 322 (citation omitted).

As stated, the inquiry is comprised of both objective and subjective components. And although the test was announced in the specific context of the liability of school board members for acts of "school discipline", it is beyond dispute that a much broader range of officials and official actions are included within the test's reach. *See O'Connor* v. *Donaldson*, 422 U.S., *supra*, at 576-77.

Since *O'Connor* and *Wood*, the courts of appeals have displayed little hesitancy in extending the qualified im-

munity to a variety of officials, including: (1) parole officers, *Wolfel* v. *Sanborn,* 555 F.2d 583, 591 (6th Cir. 1977); (2) jailers, *Bryan* v. *Jones,* 530 F.2d 1210, 1213-15 (5th Cir.) (en banc), *cert. denied,* 429 U.S. 865 (1976); (3) state bank officials, *Guzman* v. *Western State Bank of Devils Lake,* 540 F.2d 943, 951-52 (8th Cir. 1976); (4) correctional administrators, *Knell* v. *Bensinger,* 522 F.2d 720, 725 (7th Cir. 1975); and (5) police officers, *Foster* v. *Zuko,* 540 F.2d 1310, 1314 (7th Cir. 1976). Perhaps in part because of the readiness with which the courts have sanctioned *Wood's* application, the district court in this case presumed that the three social workers and Dr. Curtis were entitled to assert a qualified immunity.

We do not disagree with the district court's conclusion that a physician in Dr. Curtis' position should be permitted to assert a qualified immunity defense, *see O'Connor* v. *Donaldson, supra.* As to the merits of his defense, we have no difficulty in holding that a member of the medical profession reasonably should be aware that irrevocably terminating a patient's ability to bear children without her consent is a deprivation of a fundamental constitutional right. *See generally Roe* v. *Wade,* 410 U.S. 113 (1973); *Griswold* v. *Connecticut,* 381 U.S. 479 (1965); *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942); *Meyer* v. *Nebraska,* 262 U.S. 390 (1923), as to primacy of the right to bear and raise children.

What is less clear here is whether or not there was sufficient evidence for a jury to determine that there was no free and informed consent and that this lack of consent was intelligibly communicated to Dr. Curtis. If Dr. Curtis negligently interpreted plaintiff's communications to indicate she consented to the operation he is not liable under the standards enunciated in *Wood,* even if plaintiff did not intend to consent. However, if a jury could reasonably conclude that Dr. Curtis determined that sterilizing the

plaintiff was for her own good or the good of society and as a consequence of that belief ignored indications from the plaintiff that she did not consent to the operation, or if it could conclude that he attempted to take advantage of her mental and communication limitations to unduly influence her decision, he would be liable under both components of the *Wood* test. He should reasonably have known that such conduct amounted to an unconstitutional deprivation and he would be acting with a malicious motive. The fact that the doctor thought he had plaintiff's best interests at heart would not justify a qualified immunity for constitutional purposes any more than would the belief, if asserted by a discriminatory employer or educator, that minority group members are happier and more productive in a segregated environment.[14]

The district court's bench ruling directing a verdict for Dr. Curtis did not elaborate on its finding that "plaintiff has failed to meet her burden of showing that Dr. Curtis acted with malice or otherwise in bad faith." In reviewing this conclusion we must reverse the district court's judgment if "the evidence, viewed in the light most favorable to the party against whom the motion for directed verdict is made, is such that fair-minded men may draw different inferences therefrom and reasonably disagree as to what the verdict should be . . . ." *Arnold* v. *Aetna Engineering Co.,* 514 F.2d 1147, 1148 (1st Cir. 1975). We find that there is sufficient evidence for reasonable men to disagree as to Dr. Curtis' intentions and that this issue should be presented to the jury.

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[14] See *Duchesne* v. *Sugarman,* No. 76-7475, slip op. 6111, 6126-27 n.24 (2d Cir. Sept. 28, 1977) ("Nevertheless, '[o]f all tyrannies a tyranny sincerely exercised for the good of its victims may be the most oppressive . . . . [T]hose who torment us for our own good will torment us without end for they do so with the approval of their own conscience.' Goldstein [Medical Care for the Child at Risk: On State Supervention of Parental Autonomy, 86 Yale L. J. 645 n.19 (1977)], *quoting,* Lewis, *The Humanitarian Theory of Punishment,* 6 Res Judicatae 224, 228 (1952).").

A jury could conclude (1) that Dr. Curtis believed plaintiff to be promiscuous, of low intelligence and easily influenced, and that he concluded that her sterilization would be in her best interest; (2) that as a consequence of that belief, he deliberately ignored repeated indications from plaintiff and her fiance that they did not want the operation to take place; (3) that for the same reason the doctor failed to take any of the precautionary steps that might have prevented the operation, *i.e.*, that he did not call the probate judge to determine if plaintiff's guardian could legally consent to the sterilization,[15] he did not obtain plaintiff's signature on the sterilization permit, and he accepted without dispute advisory reports from his colleagues that included non-medical conclusions of a speculative and prejudicial nature; and (4) that Dr. Curtis took advantage of plaintiff's difficulty in communicating and impressionable nature to manipulate her into consenting to the operation.

In evaluating the doctor's conduct we may take cognizance of the extraordinary degree of helplessness of the plaintiff. Malice for constitutional purposes includes "callous" or "wanton neglect", *Harper* v. *Cserr*, 544 F.2d, *supra*, at 1121, and "'reckless indifference to the rights of the individual citizen'", *Kelley* v. *Dunne*, 344 F.2d 129 (1st Cir. 1965). Whether conduct is wanton or reckless depends in part on the context in which it occurs, and this includes the inability of the victim to protect himself.

[15] Even though he did not attempt to determine if he had a legal basis to perform the operation, it might be that a spendthrift guardian, appointed under 18 M.R.S.A. § 1801, has authority to consent. *But see Wade* v. *Bethesda Hospital*, 356 F. Supp. 380, 383 (S.D. Ohio 1973). In such event, the doctor would have acted in accordance with the statute. This being the case, there could be a deprivation of plaintiff's constitutional rights only if the statute were to be held unconstitutional at least as applied here. *See Sparkman* v. *McFarlin*, 552 F.2d 172, 173 (7th Cir. 1977), *petition for cert. filed*, 45 U.S.L.W. 3847 (U.S. June 8, 1977) (No. 76-1750). We express no position on this issue at this time.

We do not intimate that any of the above inferences are true. The evidence that supports them is in dispute. In many cases conflicting inferences can be drawn from the same set of facts. We are solely concerned with the possibility that, given the condition of the plaintiff and the evidence described, reasonable men could come to the conclusion that the doctor did not act in good faith.[16] As the Second Circuit noted recently in *Duchesne* v. *Sugarman*, *supra*, in a complicated § 1983 suit against welfare employees and child care institutions for taking custody of two children without their mother's consent, "the issue of good faith presents questions of fact which are peculiarly within the jury's province." We think that generalization is equally applicable to this case. Plaintiff should be given the opportunity to convince a jury that she has a right to recover damages for the injury she alleges.

The district court also assumed that the state social workers were entitled to rely upon the good faith immunity. Based upon our reading of the Supreme Court's decisions in this area, we believe that such an assumption was improper.[17] As we interpret the existing precedent, the Court has never attempted to articulate a wholesale immunity for all state officials. As the Court recently explained in *Imbler*, the

> "earlier decisions on § 1983 immunities were not products of judicial fiat that officials in different branches of

[16] Reversal of the directed verdict granted the doctor is limited to the cause of action for sterilizing plaintiff. Because the doctor was not involved in postponing plaintiff's marriage or removing the second child from her custody, we affirm so much of the district court ruling as directed a verdict for the doctor on those allegations.

[17] Sections I and III of this opinion reflect the unanimous judgment of the court, as does the discussion of Dr. Curtis' immunity in Section II. The balance of Section II, which treats the purported immunity of the social workers and Roberta Sawtelle, reflects the judgment of the majority, Judges Tuttle and Wollenberg. Chief Judge Coffin dissents from this portion of Section II.

government are differently amenable to suit under § 1983. Rather each was predicated upon *a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it.*" 424 U.S. at 421 (emphasis added).

The requisite inquiry thus is two-fold. As an initial matter, the district court should consult the common law to determine whether or not the particular official sued has traditionally been accorded any sort of immunity in actions comparable to the cause of action asserted under § 1983. For example, in *Pierson* the Court held that

> "the defense of good faith and probable cause, which the Court of Appeals found available to [police] officers in the common-law action for false arrest and imprisonment, is also available to them in the action under § 1983." 386 U.S. at 557.

And in *Wood*, the grant of a qualified immunity to the school officials sued there was based in part upon the finding that

> "[a]lthough there have been differing emphases and formulations of the common-law immunity of public school officials in cases of student expulsion or suspension, state courts have generally recognized that such officers should be protected from tort liability under state law for all good-faith, nonmalicious action taken to fulfill their official duties." 420 U.S. at 318 (footnote omitted).

In light of the significant role played by an analysis of relevant common-law principles in the Supreme Court's decisions, no less can be required each time a lower court seeks to extend the immunity to yet another category of officials.

The second phase of the analysis recognizes that the common-law tradition may not always serve as an infallible guide. When necessary, the Court has exhibited a willingness to make available a qualified immunity "to avoid discouraging effective official action by public officers charged with a considerable range of responsibility and discretion." *Wood* v. *Strickland*, 420 U.S. at 317-18. That an element of public policy is in some instances inherent in the inquiry was made clear in *Scheuer*, where the Court summarized as follows:

> "This official immunity [of government officials] apparently rested, in its genesis, on two mutually dependent rationales: (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good." 416 U.S. at 239-40.

Against this background, the Court went on to hold that in each instance the immunization available depends upon the "scope of discretion and responsibilities of the office and all of the circumstances as they reasonably appeared at the time of the action" for which relief is sought. *Id.* at 247. In this context, the qualified immunity rests in part upon the idea that public policy requires that certain officials be able to perform their discretionary duties without having to fear that good-faith errors in judgment may ultimately result in damages liability.

Neither the Supreme Court nor this court has ever held that state social workers are entitled to assert a qualified immunity.[18] As previously indicated, the district court

[18] One court has applied the *Wood* standards in a § 1983 action against "supervisory level municipal welfare employees." *Duchesne* v. *Sugarman*,

merely presumed that such was the case. Consequently, the "considered inquiry" referred to in *Imbler* was never undertaken. The exacting nature of the task imposed requires that the defendants first be given an opportunity to develop the relevant factual data and legal principles, thus providing the district court a proper basis for decision. It may well be that if this court is subsequently called upon to review the findings made in this regard, these defendants' beliefs in the availability of a qualified immunity will be sustained. However, in the absence of any factual development as to the nature of the positions involved and the range of responsibilities committed to these defendants, it would be inappropriate at this point for this court to attempt to answer such a crucial question.[19]

No. 76-7475, slip op. 6111 (2d Cir. Sept. 28, 1977). However, the opinion in that case suffers from the same lack of analysis evidenced in the instant case.

[19] Only if the district court is able to conclude that the social workers are entitled to rely upon a good faith defense will the sufficiency of plaintiff's proof of bad faith be called into issue. In this regard, we reiterate that summary disposition is peculiarly inappropriate in cases in which motive and intent play a leading role. And, while our resolution of the immunity issues makes it unnecessary to pass upon the sufficiency of plaintiff's proof, we note that our review of the record indicates that her claims against the social workers should be resolved by the jury.

We do not believe that our requiring the district court to examine the common law, the nature of the office involved, and the relevant policy considerations before extending the good faith immunity to yet another class of state officials is inconsistent with the recent decision in *Procunier* v. *Navarette*, 46 U.S.L.W. 4144 (U.S. Feb. 22, 1978). Although one of the dissenters in *Procunier* suggested that the majority opinion there, when "coupled with *O'Connor* v. *Donaldson* . . . , strongly implies that every defendant in a § 1983 action is entitled to assert a qualified immunity from damage liability", *id.* at 4148 (Stevens, J., dissenting), we do not share that view.

The defendants in *Procunier* were state prison officials, and, as stated in the majority opinion: "The courts of appeals have generally accorded prison and jail administrators performing discretionary functions a qualified immunity from monetary liability under § 1983." *Id.* at 4146 n.7 (citations omitted). Although the Court's conclusion that the defendants before it were entitled to rely upon the good faith immunity was not predicated upon the "reasoned analysis" undertaken in prior cases, such an analysis was not necessary under the circumstances. Prior to *Procunier* there had developed in the circuits a substantial body of law as to the right of prison officials to assert a qualified immunity under the terms and scope of *Wood*. No such precedent exists with respect to the type of state official sued in this case.

There remains then only the asserted immunity of Roberta Sawtelle, whose role in the operation and the taking of plaintiff's child was played in concert with Dr. Curtis and the social workers. Even if the district court is able to conclude that the officials are protected by some qualified immunity, Sawtelle is not entitled to benefit from such a holding.

In *Adickes* v. *Kress & Co.*, 398 U.S. 144 (1970) the plaintiff alleged in a § 1983 action for damages a deprivation of her Fourteenth Amendment equal protection rights as a result of concerted action between certain police officers and a public restaurant facility. *Id.* at 146-47. The Supreme Court held that the district court had erred in granting summary judgment against the plaintiff and explained:

> "The involvement of a state official in . . . a conspiracy [with a private party] plainly provides the state action essential to show a direct violation of petitioner's Fourteenth Amendment equal protection rights, *whether or not the actions of the police were officially authorized or lawful;* . . . Moreover, a private party involved in such a conspiracy, even though not an official of the State, can be liable under § 1983." *Id.* at 152 (citations omitted) (emphasis added).

The significance of this holding becomes apparent only when considered in the context in which it was announced — the plaintiff sought damages from the private party alone, and neither the state nor any state official was joined as a defendant. It is thus plain that once the requisite show-

ing of concerted action is made, and assuming that some colorable constitutional deprivation is made out, the injured party has an independent cause of action for damages against the private party involved. The ultimate destiny of the private party can in no way be said to depend upon the status of the official with whom he conspired or upon the defenses available to that official. The concerted action which permits a finding of state action cannot simply be erased by the absence of the state actor as a defendant or by the fact that the state actor might later raise a successful defense to the plaintiff's claim.

Nor can it be said that a private individual shown to have acted in concert with state officials may rely upon any type of qualified immunity, whether derivatively or otherwise. In *Monroe* v. *Pape,* 365 U.S. 167, 187 (1961), the Supreme Court held that § 1983 "should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions." In the case of public officials, the Court has reasoned that a "good faith" qualified immunity is an integral part of this background, *Pierson* v. *Ray,* 386 U.S. at 556-57, and that certain officials are therefore entitled to rely upon such an immunity. But the Court has never held that private individuals are in any way shielded from damage liability in a comparable fashion. To the contrary, the Court in *Adickes* recognized the plaintiff's right to proceed solely against the private defendant, despite the fact that three years earlier the Court had sanctioned a qualified immunity for the police officers with whom the defendant allegedly had conspired. *See Pierson* v. *Ray, supra.*

To place this court's imprimatur upon an immunity in favor of a private individual could in many instances work to eviscerate the fragile protection of individual liberties afforded by the statute. Private parties simply are not

confronted with the pressures of office, the often split-second decisionmaking or the constant threat of liability facing police officers, governors and other public officials. Whatever factors of policy and fairness militate in favor of extending some immunity to private parties acting in concert with state officials were resolved by Congress in favor of those who claim a deprivation of constitutional rights. Consequently, we hold that the *Wood* defense is not available to Roberta Sawtelle and that her liability is to be determined by the jury without regard to any claim of good faith.

III. THE § 1985 CLAIM

Plaintiff has failed to present authority for her assertion that the deaf constitute a class for the purposes of 42 U.S.C. § 1985. Even if such a class is cognizable, *but see Bricker* v. *Crane,* 468 F.2d 1228 (1st Cir. 1972), plaintiff has not established that her membership in it was the cause of the alleged discrimination against her. *See Harrison* v. *Brooks,* 519 F.2d 1358 (1st Cir. 1975). The district court properly dismissed the § 1985 claim against all defendants.

Affirmed in part, reversed in part, and remanded.

COFFIN, *Chief Judge,* dissenting. I respectfully dissent from that part of the majority opinion relating to the immunity of Roberta Sawtelle, and the three defendant social workers. The majority contends that public officials should receive absolute or qualified immunity from § 1983 liability only if common law traditions of immunity or public policy interests in protecting the free exercise of official discretion are found to require the extension of such protection to particular classes of officials. As an abstract proposition, this approach has a certain attraction. But at the present time a significant body of case law has developed concerning who is eligible for immunity. Reasonable inferences from these precedents convince me

that a remand is unnecessary on this issue and that social workers fall within the range of those permitted to assert the qualified immunity detailed in *Wood* v. *Strickland,* 420 U.S. 308 (1975).

The majority acknowledges that the Supreme Court has extended qualified immunity to include hospital administrators, school officials, police officers, prison officials, and executive officers. Lower courts have applied the *Wood* v. *Strickland* test to parole officers, correctional staff, and even state bank officials. I fail to see why one would doubt that social workers would be included within this official continuum. There seems little basis for distinguishing them in terms of the public policy rationale, and social workers are a new enough profession to make it unlikely that relevant common law traditions will shed light on their status. Rather than remand for a determination whether or not the social workers were entitled to assert a qualified immunity defense, I would hold that they are and proceed directly to the question whether sufficient evidence has been presented to reach the jury as to their subjective and objective "bad faith". However, in light of the majority's disposition of this issue, I express no opinion as to whether the record supports a directed verdict on the immunity question.

My second point of disagreement with the majority concerns the liability of Roberta Sawtelle. It is by no means clear to me that a private party allegedly acting in concert with state actors should be subject to damages, if the state actors can successfully assert a qualified or absolute immunity. The majority's analysis based on the *Adickes* case is not without merit. And I share the desire to avoid any erosion of the protections afforded citizens by § 1983. But both a sense of fairness and public policy caution against adopting an inflexible rule permitting pri-

vate parties to be held liable when relevant and perhaps critically important state actors are immune. Particularly strong is the case for not imposing liability on a private person when his state actor collaborator has not manifested sufficient bad faith to breach a qualified immunity. Therefore, to the extent the state actors with whom Ms. Sawtelle allegedly acted in concert are found to be immune under *Wood* v. *Strickland,* I would hold that the corresponding claims against Ms. Sawtelle should be dismissed.

United States Court of Appeals
For the First Circuit

No. 77-1260.

GEORGIA MAE DOWNS,
PLAINTIFF, APPELLANT,

v.

ROBERTA SAWTELLE, ET AL.,
DEFENDANTS, APPELLEES.

JUDGMENT

Entered March 30, 1978

This cause came on to be heard on appeal from the United States District Court for the District of Maine, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed in part, vacated in part and remanded for further proceedings in accordance with the opinion filed this day.

Costs are to be assessed as follows: Appellant may recover 60% of her costs from appellees Milo Community Hospital and John B. Curtis; appellant may recover 20% of her costs from appellees Ruth A. Hagan, Marilyn B. Dow, Mary Lou Pattison and Roberta Sawtelle; Appellees Davis A. Goodine, Ava Strout and Carl H. Carlson may recover their costs from appellant.

By the Court:

/s/ Dana H. Gallup

Clerk.

RELEVANT STATUTORY PROVISIONS

Me. Rev. Stat. Ann. tit. 18, § 3505 (1964)

§ 3505. General duties of guardian

The guardian shall settle all accounts of his ward; pay all his just debts out of his personal estate so far as it will go without disposing of effects necessary for the use and comfort of the ward and his family, and in case of deficiency thereof, then out of the real estate; demand, sue for and receive all his dues, compound for the same and give discharges thereof on such terms as the judge authorizes; appear for and represent his ward in all legal proceedings unless another is appointed for that purpose as guardian or next friend; and may insure any estate of his ward

Me. Rev. Stat. Ann. tit. 18, § 3605 (1964)

§ 3605. Authority and duties

Such guardians shall have the custody of the persons of their wards, if resident in the State, except so far as the court of probate may from time to time otherwise order. Every guardian appointed over any person for gambling, idleness, drinking or debauchery shall inculcate upon him habits of sobriety and industry, and when of sufficient health and strength, with the approbation of the judge, may bind him out to labor, not exceeding 6 months at any one time, or employ him in his own service, giving credit for his earnings or such sum as he receives therefor.

Me. Rev. Stat. Ann. tit. 22, § 3794 (Supp. 1975), as amended, Me. Rev. Stat. Ann. tit. 22, § 3794 (Supp. 1977)

§ 3794. Bond required for private custody; maintenance and education; children and relatives not paupers

The department shall provide for the maintenance and education in or by duly incorporated children's institutions and child welfare organizations, or in family homes, of any children committed to its custody under sections 3791 to 3793. Bills itemizing the expense of maintenance and education of children committed under this chapter, when approved by the department, shall be paid by the State as provided by law. At the request of the parents or next friend of any dependent child under 18 years of age who is without parent or grandparent of sufficient ability, or without other relatives able and willing to provide for its care, the department may make provision, without intervention of court, for the care of such child. No such child, nor the parents or grandparents of such child who are unable to provide for its care, shall be deemed paupers by reason of any care furnished to the child under this chapter. The settlement of a child committed to custody other than that of a parent under this chapter shall not change during the period of such custody.

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Supreme Court, U. S.
FILED
JUL 28 1978
MICHAEL [illegible] JR., CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM 1978.

No. 77-1842.

RUTH A. HAGAN, MARILYN B. DOW,
MARY LOU PATTISON
AND
JOHN CURTIS, M.D.,
PETITIONERS
v.
GEORGIA MAE DOWNS,
RESPONDENT

Brief of Georgia Mae Downs in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Brief of Georgia Mae Downs in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Argument.

1. THE PETITIONERS HAVE PRESENTED A DISTORTED PICTURE OF THE FACTS UPON WHICH THE QUESTIONS REST.

The Petitioners do not claim that the court of appeals applied the wrong standard for reviewing the district court's grant of a directed verdict. The standard applied was whether the evidence, viewed in the light most favorable to the Respondent, is such that fair-minded men may

draw different inferences therefrom and reasonably disagree as to what the verdict should be (Cert. App. 31). A comparison of the Petitioner's statement of facts (Cert. Pet. 3) with that of the court of appeals (Cert. App. 15) shows that the Petitioners have erroneously presented the evidence viewed in the light most favorable to themselves. In some instances, the Petitioners have stated facts which are wholly absent from the record to be considered on directed verdict.

In the very first sentence of their factual presentation, the Petitioners state that the Respondent had received social services from the Maine Department of Health and Welfare during her first pregnancy in 1971 (Cert. Pet. 3-4). There is nothing in any exhibit, trial transcript or pleading which supports this statement. Likewise, there is nothing in the record to be considered on directed verdict which would support the statement that during the first pregnancy Petitioner Dow communicated with the Respondent through Roberta Sawtelle (Cert. Pet. 4); or that the Respondent was housed, fed, and generally looked after by Roberta Sawtelle (Cert. Pet. 4); or that the probate court requested Dow to prepare a report regarding guardianship (Cert. Pet. 5); or that Pattison had discussions with Roberta Sawtelle regarding the Respondent's unborn child (Cert. Pet. 6).

The factual setting dealt with by the court of appeals is distorted by the Petitioner's presentation of facts in the light most favorable to themselves. It is inaccurate to state that Roberta Sawtelle was able to communicate with the Respondent in sign language (Cert. Pet. 4). The Respondent testified that she was able to understand Roberta Sawtelle's signs only a little and Mrs. Dow admitted that she was never completely sure that the Respondent understood what Roberta Sawtelle was saying

to her. It is misleading to state as a fact that Davis Goodine contacted the Department of Health and Welfare to request assistance with a sterilization of the Respondent (Cert. Pet. 4) when, as the court of appeals pointed out, there was conflicting evidence as to the origin of the idea to have the Respondent sterilized and that there was evidence that the agency initiated the idea (Cert. App. 16).

The Petitioners state that Petitioner Dow recommended to Davis Goodine that he apply for guardianship over the Respondent in order to gain control over her (Cert. Pet. 4). However, the recommendation actually was that he apply for guardianship over the Respondent in order to gain control over her in order that she might be sterilized. The statement that Dow discussed guardianship with the Respondent (Cert. Pet. 5) is misleading since the record contains an admission by Dow that she never inquired as to whether the Respondent wanted anyone to be her guardian.

Although the Petitioners state that an attorney represented the Respondent at the probate hearing (Cert. Pet. 5) the only thing in the record on the subject is Dow's statement that John Easton, Roberta Sawtelle's attorney in this case, was with Roberta Sawtelle and the Respondent and that she did not recall ever being told by anyone that he was representing the Respondent.

The Petitioners state that although Dr. Curtis was convinced that the Respondent was in agreement with the sterilization, the Respondent testified that she did not consent (Cert. Pet. 5). Not only did she not consent, she testified that she told Dr. Curtis that she did not want the operation and she wrote him a letter telling him that she wanted additional children. They also state that the sterilization was performed in part upon what Dr. Curtis

perceived and believed to be the Respondent's consent (Cert. Pet. 6). As the court of appeals pointed out, the evidence most favorable to the Respondent admits of the conclusion that Dr. Curtis deliberately ignored repeated indications from the Respondent and her fiance that they did not want the operation to take place (Cert. App. 32).

The Petitioners state that the child was placed by the social workers in a foster home on the strength of the guardian's signature 9 days before the judicial commitment procedure was instituted (Cert. Pet. 6). This statement is incomplete without including the facts that Pattison believed that the Attorney General had stated that the only way the baby could be taken into care was through a judicial commitment procedure and that the first judicial order authorizing the agency to have care of the baby was issued 27 days after they took him into care. They state that the Respondent did not express any concern or objection that her child had been placed in a foster home (Cert. Pet. 6). However, the Respondent was not permitted to see her child after its birth, despite her requests to do so (Cert. App. 19). They state that the Respondent indicated to the Maine District Court that she had no objection to the baby being placed in state custody (Cert. Pet. 7). However, the evidence most favorable to the Respondent is that, even though she was unrepresented by counsel and had no impartial interpreter, she told the judge that she wanted her baby.

The Petitioners state that the social workers believed that the Respondent's marriage to Downs might have unnecessarily delayed the judicial commitment (Cert. Pet. 7). They make this statement apparently to justify their efforts in delaying the marriage. The record, however, shows that they decided to delay the marriage long before they even contemplated the commitment proceedings.

The court of appeals found that the evidence most favorable to the Respondent was that Dow and Sawtelle were aware that the existence of a husband could impede efforts to have the child adopted and agreed that Sawtelle would persuade the Respondent that Sawtelle's consent to the marriage was required and that Sawtelle would withhold the consent until after the baby's birth (Cert. App. 16). Without any support in the record, the Petitioners now state that their decision to delay the marriage was based in part on a statement by Mr. Downs that he did not want the child (Cert. Pet. 7). The court of appeals found that Downs did want the child and wanted it to bear his name (Cert. App. 16).

The Petitioners assert that there was no evidence to indicate that the social workers were aware that the Respondent was opposed to the sterilization (Cert. Pet. 5). On the contrary, the evidence permits the inference that the social workers knew that the Respondent was not in favor of the sterilization. They would not have had to deceive the Respondent into delaying her marriage (Cert. App. 16) if they had thought she was in favor of the sterilization. There would have been no need for the social workers to recommend guardianship for the purpose of sterilization had they believed she would consent voluntarily. There was also evidence that although the social workers learned from the Maine Attorney General that the Respondent's signature would be sufficient to surrender her child to them, the social workers elected not to ask her to sign, but to take the child without her signature and to later institute state court action to obtain

legal custody of the child. An inference that the social workers knew that the Respondent would not consent to the surrender can be drawn. Their knowledge of the Respondent's opposition in this instance also tends to show their knowledge of the Respondent's opposition in general.

The Petitioners argue that a review of the record by the Court will fail to disclose any inference of malice attributable to any of the Petitioners (Cert. Pet. 13). They seem to overlook the court of appeals' detailed analysis of the evidence concerning Dr. Curtis' conduct (Cert. App. 16-18) and the conclusion by the court of appeals that a permissible inference which could be drawn from that conduct was malice and a lack of good faith (Cert. App. 31-33).

The Petitioners' statement of facts cannot be relied upon in evaluating the questions presented. Their failure to recognize that the evidence must be considered in the light most favorable to the Respondent assures that, if the Court grants certiorari, the "questions presented" will not be reached due to the presence in the record of facts and inferences conflicting with those stated by the Petitioners.

2. The Opinion Below Is in Accordance with Decisions of the Court Regarding the Availability of Qualified Immunity to Public Officials Sued under 42 U.S.C. § 1983.

The court of appeals held that the district court erred in assuming that the defendant social workers were entitled to rely upon the defense of good faith immunity available to certain public officials in causes of action asserted under 42 U.S.C. § 1983. The issue was remanded to the district court to provide an opportunity for the defendants to develop the relevant factual data and legal principles upon which the district court could properly base a decision.

In so holding, the court of appeals relied on a series of the Court's decisions spanning the past decade which have addressed the immunity of certain state officials when sued under § 1983. See *Procunier v. Navarette,* 46 U.S.L.W. 4144 (February 22, 1978) (prison officials); *Imbler v. Pachtman,* 424 U.S. 409 (1976) (prosecutors); *O'Connor v. Donaldson,* 422 U.S. 563 (1975) (superintendent of state hospitals); *Wood v. Strickland,* 420 U.S. 308 (1975) (school board members); *Scheuer v. Rhodes,* 416 U.S. 232 (1974) (state governor, president of state university, officers of state national guard); *Pierson v. Ray,* 386 U.S. 547 (1967) (judges and police officers). In some cases, the Court determined that the types of state officials involved were entitled to absolute immunity from § 1983 damage liability for acts performed in their official capacities. See *Imbler v. Pachtman, supra,* and *Pierson v. Ray, supra,* while in other cases the Court found only a qualified immunity which shields certain state officials from damage liability for official actions shown to have been taken in good faith. Since there is no language in § 1983 which extends any immunity to state officials, the Court's decisions on § 1983 immunities "were not products of judicial fiat," but rather were based upon "a considered inquiry into the immunity historically accorded the particular official at common law and the interests behind it," *Imbler v. Pachtman, supra,* at 421. In addition to an analysis of relevant common law principles, the Court has also recognized the need to examine the public policy considerations involved in affording a qualified immunity to "public officers charged with a considerable range of responsibility and discretion," *Wood v. Strickland, supra,* at 317-18.

Such public policy considerations include (1) the injustice, absent bad faith, of subjecting an official to liability who is required to exercise discretion in the performance of his or her duties and (2) the danger that the threat of such liability would deter the necessary decisiveness and judgment of such official to the overall detriment of the public good. See *Scheuer v. Rhodes, supra,* at 240.

The Court has never determined that the qualified immunity available to certain state officials extends to social workers. The court of appeals was entirely correct, therefore, in remanding this issue to the district court to be determined in accordance with the carefully delineated principles of § 1983 immunities previously set forth by the Court. Only through a "considered inquiry" into the relevant common law principles and public policy considerations involved, can a reasoned determination be made as to what type of, if any, qualified immunity the social workers will be entitled to assert. This determination first and foremost requires an initial factual development at the district court level as to the nature of the positions involved and the range of responsibilities required to be exercised by such officials. Contrary to the Petitioners' assertions, such factual developments are not as yet revealed by the record in this case.

The social worker Petitioners contend that the court of appeals erred in remanding to the district court. Based on the Court's decisions in *Procunier v. Navarette, supra,* and *O'Connor v. Donaldson, supra,* the Petitioners assert that the Court has abandoned the requirement of a "considered inquiry" into the relevant common law and public policy considerations so carefully enunciated in *Imbler, Wood,* and *Scheuer,* and has now extended an automatic qualified immunity to every public official sued under § 1983. Upon examination, this assertion is patently without merit.

In *O'Connor v. Donaldson, supra,* a case involving the liability of a superintendent of a state hospital, the Court remanded the case to enable the court of appeals to consider, in light of *Wood,* whether the district judge's failure to instruct the jury with regard to the effect of O'Connor's claimed reliance on state law was reversible error. The availability of a qualified immunity for O'Connor was not at issue in the case since the district judge had already instructed the jury, without objection, that O'Connor was entitled to a good faith defense.

After *O'Connor,* the Court in *Imbler v. Pachtman, supra,* reiterated the necessity of a reasoned analysis or "considered inquiry" in determining the availability or scope of § 1983 immunities available to public officials. In *Procunier v. Navarette, supra,* at 4146 n. 7, the Court adopted without further discussion, the reasoned analysis already undertaken by a number of courts of appeals, that prison and jail administrators performing discretionary functions were entitled to a qualified immunity.

Any doubts as to the continuing viability of the "considered inquiry" requirement are resolved by the most recent pronouncement of the Court on the issue in *Butz v. Economou,* 46 U.S. L.W. 4952 (June 29, 1978). While that case involved an examination of the immunities to which certain federal officials were entitled in claims for damages arising from alleged violations of constitutional rights, the analysis involved was based on the identical considerations required in cases regarding the immunities of state officials. The Court reviewed the principles laid down in previous cases and undertook an examination of both the common law and public policy considerations involved.

Nothing less than such a "considered inquiry" at the district court level is required here, where the issue of

to what degree of immunity, if any, the Petitioner social workers are entitled is one which lacks both prior judicial analysis and prior factual development as to the nature of the positions involved.

3. THE PETITIONERS ARE NOT ENTITLED TO IMMUNITY AS A MATTER OF LAW BECAUSE THEY ARE UNABLE TO SHOW THAT BOTH THE OBJECTIVE AND SUBJECTIVE COMPONENTS OF THE TEST FOR QUALIFIED IMMUNITY HAVE BEEN CONCLUSIVELY SATISFIED.

The Court has held in *Wood v. Strickland, supra,* that public officials are immune from damage liability under § 1983 for their official actions taken in good faith. Their immunity is qualified by the good faith requirement. The requisite good faith will not be found to exist if the public official knew or reasonably should have known that his official action would violate the constitutional rights of the plaintiff. In addition, good faith will not be found to exist if the public official acted with malicious intent.

The district court ruled that the deprivation of a person's ability to bear children, or of a person's right to raise children or of a person's right to marry are deprivations of constitutional rights which the state cannot accomplish without due process of law (Cert. App. 6). The court of appeals held that a member of the medical profession reasonably should be aware that irrevocably terminating a patient's ability to bear children without her consent is a deprivation of a fundamental constitutional right (Cert. App. 30).

The Petitioners argue that the authority of a guardian to supply consent to the involuntary sterilization of her ward was unsettled at the time of their actions and that this uncertainty brings them clear of the objective portion of the *Wood* test. If there had been no guardian there

would have been no uncertainty. Mrs. Dow initiated the idea of guardianship by recommending it to Davis Goodine for the express purpose of sterilizing the Respondent. Now, after the guardian has been brought into the picture at their recommendation, the social workers cannot complain that the guardian's presence adds uncertainty of the sort which would cause their acts to be deemed in good faith.

Dr. Curtis, recognizing his ignorance concerning the authority of a guardian to supply consent, called the social workers to find out who could consent and was told to call the local probate judge (Cert. App. 18). Dr. Curtis elected to avoid the risk of discouragement by not calling the judge. He performed the operation on the consent of the guardian in the face of his recognized ignorance. As the court of appeals ruled, "reasonable men could come to the conclusion that the doctor did not act in good faith" (Cert. App. 33).

Moreover, the law in Maine at the time of the acts in question was not unsettled. Maine, like several other states, had a eugenic sterilization statute which provided for the involuntary sterilization of certain people upon the consent of a guardian. 34 Me. Rev. Stat. Ann. § 2461 (see Appendix to this Brief, pp. 17-18). The Maine statute provides that sterilization operations upon the consent of a guardian shall be lawful if the statute's conditions and restrictions are met. Among its conditions and restrictions are the requirements that the subject must be feeble-minded, and mentally incapable of giving his own consent. Milo Community Hospital relies upon compliance with this statute as an affirmative defense raised in its answer. However, the other defendants, after Dr. Curtis admitted that the Respondent was not fleeble-minded and was capable of giving her own consent, stipulated that the Maine statute

was not followed. The Petitioners suggest that the authority of a guardian to consent to an involuntary sterilazation was unclear, but they do not explain how this is so in the face of a statute which legalizes such a procedure only if the statute's terms are complied with.

The Petitioners in their argument do not deal with the possibility that the social workers and the doctor could be found to have acted maliciously. According to the *Wood* test, good faith can be dissolved either by the objective reason to know better or by the subjective malicious intent. The court of appeals, in evaluating the evidence most favorable to the Respondent concluded that the evidence supports an inference of malice on the part of Dr. Curtis (Cert. App. 32). Although the court of appeals did not find it necessary to rule directly on the Respondent's proof of the social worker's bad faith, it did note "that our review of the record indicates that her claims against the social workers should be resolved by the jury" (Cert. App. 36).

4. The Court of Appeals Correctly Ruled that Dr. Curtis Was a State Actor due to His Relationship to the Milo Community Hospital.

The Petitioner Curtis asserts that the court of appeals was in error in ruling that he was a state actor on the basis of his association with Milo Community Hospital for two reasons. The first reason claimed is that his position as chief of staff had no relationship with the Respondent's § 1983 claim. The second reason claimed seems to be that the court of appeals was unable to find a "nexus" between the state and the hospital as to the conduct complained of.

Dr. Curtis' duties as chief of staff included carefully supervising the clinical work of the hospital. The respon-

sibility for the operation and maintenance of the hospital and the evaluation of hospital practices was a joint effort by the trustees, the administrator and the chief of staff (Cert. App. 26). The record indicated that the hospital had a regulation which permitted sterilization in any of six circumstances and that only one of them, mental retardation, could even arguably have applied to the Respondent. Dr. Curtis did not consider the Respondent retarded, but yet he wrote in the hospital medical record that he recommended sterilization " 'based 90% on this girl's low mentality involving poor judgment and her lack of restraint on sex appetite and its consequences' " (Cert. App. 17). Dr. Curtis also permitted the operation to go forward in violation of another hospital policy which required the patient's own signature on a standardized sterilization consent form. Although the Respondent could have understood the form and had signed other minor forms, her signature was not obtained (Cert. App. 18).

The only reason the clinical work of Dr. Curtis, the private physician, was not carefully supervised by a third party chief of staff was because Dr. Curtis was also the chief of staff. Dr. Curtis', the private physician's, violations of the hospital's sterilization regulations were allowed to harm the Respondent only because of the collusion of Dr. Curtis, the chief of staff.

Not only was the court of appeals correct in its analysis of the state action aspects of the hospital in relation to the *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) symbiotic relationship test which was reaffirmed by *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974), but a nexus, in the *Jackson* sense, also exists. The court of appeals recognized the possibility that the symbiotic relationship between the town and the hospital could produce a nexus due to the fact that the town paid

the expenses of the sterilization. The court of appeals was unclear as to:

> "how much, if any, discretion was exercised by the town in determining to make the payment. If not all indigents' hospitals bills were paid by the town as a matter of course and if plaintiff's bill was paid as a matter of discretionary judgment, such facts would point to a nexus between the town and the hospital as to the specific conduct complained of" (Cert. App. 25-26).

If the town had any obligation to pay for medical services for the Respondent, such an obligation could only have resulted from its duty to relieve poverty. In 1972 and 1973 the town's obligation to its poor was administered by overseers. 22 Me. Rev. Stat. Ann. § 4459 provided that:

> "Overseers shall have the care of all paupers or persons dependent upon the town for their support residing in their town and cause them to be relieved and employed at the expense of the town. . . . "

Case law construing the overseers' powers and duties has consistently held that overseers act with discretion in determining the necessity of, the nature of, and the extent of any relief to be furnished to indigents, *Inhabitants of Fort Fairfield v. Inhabitants of Millinocket,* 136 Me. 426, 12 A. 2d 173 (1940).

In making the decision to pay the Respondent's hospital bill and her bill from Dr. Curtis for the sterilization, the town exercised broad discretion. It could have declined to pay the bills due to the nature of the charges, or due to the amount of the charges, or due to the Respondent's lack of need for the services. The exercise of its discretion in paying the Respondent's bills points to a nexus between the town and the complained of activity.

Conclusion.

For the reasons set forth above, the petition for certiorari should be denied.

Respectfully submitted,

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Appendix.

22 Me. Rev. Stat. Ann.

§ 4459. Overseers' duties; employment of paupers or dependent persons

Overseers shall have the care of all paupers or persons dependent upon the town for their support residing in their town and cause them to be relieved and employed at the expense of the town. The town may direct their employment, whether said pauper or other dependent person has a settlement in their town or not. Nothing contained herein shall in any way diminish the liability of the town of settlement or of the State with respect to the reimbursement to the town of residence for supplies furnished to such pauper or dependent person. Overseers of the poor and all other officers having charge of the administration of pauper funds shall keep full and accurate records of the paupers fully supported, the persons relieved and partially supported and the travelers and vagrants lodged at the expense of their respective towns, together with the amount paid by them for such support and relief; and shall annually make return of the number of such persons supported and relieved, with the cost, to the Department of Health and Welfare. Any person who refuses without lawful excuse to perform the employment directed by the town shall be punished by a fine of not more than $20 or by imprisonment for not more than 90 days for each offense, or by both.

R.S.1954, c. 94, § 12.

34 Me. Rev. Stat. Ann.

§ 2461. Consent necessary; procedure prior to operation

The operation of vasectomy and fallectomy may be performed under the conditions and within the restrictions described and under such provisions shall be lawful.

When either of the recognized sterilizing operations referred to may be indicated for the prevention of the reproduction of further feeble-mindedness, or for the therapeutic treatment of certain forms of mental disease, physicians may recommend to the nearest relative, guardian and affected individual the advisability and necessity of such operation. When the written consent of the patient, when mentally competent to give such consent or the written consent of the nearest relative or guardian when the patient is mentally incompetent to give such consent, is given, the physician shall call a council of 2 registered medical practitioners, one a physician and one a surgeon, of not less than 5 years' practice and not related to the patient, whose duty it shall be in conjunction with the physician in charge of the case, to examine the individual recommended for operation. Whether the person to be operated upon is mentally capable of giving his consent shall be decided by the consultants and stated in writing, with their reasons therefor, and such written statement shall be kept on file at the Pineland Hospital and Training Center and in case they find that the patient is mentally incapable of giving his consent, the consent of the nearest relative or guardian must be secured. If in the judgment of the consulting physicians the operation will prevent the further propagation of mental deficiency, or if in the judgment of the medical consultants the physical or mental condition of any such person will be substantially benefited thereby, then the consultants shall select a competent surgeon to perform the operation of fallectomy or vasectomy, as the case may be, upon such person, and such surgeon may be the consulting surgeon.

R.S.1954, c. 27, § 149; 1957, c. 21, § 2.

see

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